IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jay Topkis
345 Park Avenue
New York, New York 10022
(212) 644-8000

Bernard Korman
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners American Society of Composers, Authors and Publishers, et al.

Of Counsel:

Allan Blumstein
Max Gitter
Paul, Weiss, Rifkind, Wharton & Garrison
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1977

No.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners.

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners American Society of Composers, Authors and Publishers ("ASCAP"), *et al.*,* ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered on August 8, 1977.

Opinions Below

The majority and concurring opinions of the Court of Appeals, reported at 562 F.2d 130, appear as Appendix A to this petition. The opinion of the concurring judge, on a petition for rehearing, not officially reported, appears as Appendix D. The opinion of the United States District Court for the Southern District of New York (Lasker, J.), reported at 400 F. Supp. 737, appears as Appendix B.

* This petition is filed on behalf of ASCAP, as well as the individual writer and publisher members of ASCAP who were named as defendants in the complaint filed in the District Court.

Jurisdiction

The judgment of the Court of Appeals, entered on August 8, 1977, appears as Appendix C. A timely petition for rehearing was denied on December 6, 1977. On March 1, 1978, Mr. Justice Marshall extended the time to file this petition until May 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337 and 1338(a).

Questions Presented

For 64 years ASCAP has offered the "blanket" license to commercial users of copyrighted music — the same blanket license which is the standard license in all nations of the world which recognize copyright. Since 1941, ASCAP has been required to offer such licenses by consent decrees with the Department of Justice in *United States* v. *ASCAP,* an antitrust case in the Southern District of New York.

The Court of Appeals for the Second Circuit has now held in this action that the blanket license constitutes price-fixing, that it is *per se* illegal under Section 1 of the Sherman Act, and that ASCAP's members misused their copyrights merely by offering an ASCAP blanket license to plaintiff CBS for its television network.

The Court of Appeals reached this extreme result only by expanding the *per se* doctrine far beyond the bounds sanctioned by this Court and in square conflict with decisions of the Ninth Circuit.

If the decision below is allowed to stand, the sure result will be years of turmoil in the music licensing business in the United States and around the world, confusion in the

trial and appellate courts charged with administering the antitrust laws, and a flood of new litigation.

To avoid these consequences, we urge this Court to grant certiorari to decide the following questions:

1. When individual sellers are willing and free to negotiate individual prices for their individual products in individual negotiations, does their simultaneous offer of a package of all of their products through a common sales agent at a negotiated price constitute price-fixing which is *per se* violative of Section 1 of the Sherman Act?

2. More particularly, even though ASCAP's members were willing and free to license their copyrights to the CBS television network in individual negotiations, if asked, did ASCAP and its members engage in price-fixing, illegal *per se* under Section 1 of the Sherman Act, and did they misuse the members' copyrights by offering CBS an ASCAP blanket license?

3. Is the decision below in direct conflict with the decisions of the Ninth Circuit in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (1967), *cert. denied*, 389 U.S. 1045 (1968), and *Arizona* v. *Cook Paint & Varnish Co.*, 541 F.2d 226 (1976), *cert. denied*, 430 U.S. 915 (1977), *affirming* 391 F. Supp. 962 (D. Ariz. 1975)?

Statute Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

The Parties

CBS

This case concerns only the television network operated by CBS. But this is not, of course, CBS' only activity. CBS owns five local TV stations and fourteen local radio stations, it is a leading music publisher having subsidiaries which belong to ASCAP and BMI (the other major American performing rights licensor), and it is the largest manufacturer and seller of records and tapes in the world. As the District Court found, CBS is the "No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music" (App. B, p. 93a).

ASCAP

ASCAP is an unincorporated association of creators and publishers of music; it acts as a clearinghouse for the licensing of performance rights to the copyrighted music of its 16,000 writer and 6,000 publisher members—it licenses also on behalf of the hundreds of thousands of members of some 30 affiliated foreign societies.* ASCAP's members include Samuel Barber, Leonard Bernstein, Aaron Copland and Morton Gould among serious composers, and such popular composers and lyricists as Irving Berlin, Hoagy Carmichael, John Denver, Bob Dylan, Roberta Flack, Carole King, Richard Rodgers, Carly Simon and Stevie Wonder. And it represents the estates of deceased members, among them Bela Bartok, George M. Cohan, Duke Ellington, W. C. Handy, Oscar Hammerstein II, Victor Herbert, Cole Porter and John Philip Sousa.

* Similarly the affiliated foreign societies license for ASCAP members in their countries.

Virtually every aspect of ASCAP's operations is governed by the Amended Final Judgment entered on consent in 1950 in *United States* v. *ASCAP*, [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (amending a 1941 judgment).

Under the Amended Final Judgment and the ASCAP Articles of Association and membership agreements:

(a) membership in ASCAP is open to any writer of one published song and to any music publisher;

(b) each member grants to ASCAP only the *nonexclusive* right to license performances; the member retains the right to license directly, and ASCAP is forbidden from interfering with that right;

(c) no user may be denied an ASCAP license—indeed, a user obtains an ASCAP license by the very act of applying for one;

(d) ASCAP is required to offer users the "blanket" license, which gives the user the right to perform all of the compositions in the ASCAP repertory, as often as desired, upon payment of a stipulated fee.

Blanket licenses are used throughout the world by performance rights societies in all countries which recognize copyright. The prime virtues of the blanket license are convenience, limitless choice in performing music, and freedom from concern about infringement. It gives users unlimited access to all the copyrighted compositions written by members of the licensing society and of affiliated foreign societies—without the need to seek licenses from individual copyright owners.

The Amended Final Judgment requires ASCAP also to offer broadcasters a variant of the blanket license, the

"per program" license. Here, too, the broadcaster has unlimited access to the ASCAP repertory but, instead of paying one blanket fee, the per program licensee pays a fee only for each program in which ASCAP music is performed.*

ASCAP's fees for all of its licenses are regulated by the Amended Final Judgment in that, if a user is dissatisfied with a fee quoted by ASCAP and an agreement can not be negotiated, the user has the right to have the District Court for the Southern District of New York determine a "reasonable fee." In any such proceeding, ASCAP—not the user—bears the burden of proving the reasonableness of the fee it requests.

ASCAP is in essence a cooperative. After deduction of operating expenses, it distributes all revenues among its members and the affiliated foreign societies. Distribution arrangements comply with the mandate of the Amended Final Judgment that ASCAP

> "distribute to its members the monies received . . . on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP."

Thus members receive royalty distributions only when their compositions are performed. There is no reward for the non-productive or the inefficient.

---

* As a matter of precise fact, the Amended Final Judgment requires ASCAP to issue a per program license; ASCAP is "enjoined and restrained" from issuing a blanket license unless the broadcaster so requests.

Hence, CBS and every other broadcaster which has taken an ASCAP blanket license has done so only as a result of its own voluntary act.

Proceedings Below

The District Court

As we have seen, the licensing rights which ASCAP obtains from its members are nonexclusive. In theory, therefore, neither the CBS television network nor any other user is compelled to deal with ASCAP: any user may ignore ASCAP and negotiate licenses with the members.

The principal issue tried before the District Court was whether CBS, as a practical matter, *could* obtain the licenses it desires for its television network directly from the members. Although CBS had never approached even one ASCAP member for a direct license, it sought to prove that any such effort would be futile since ASCAP members would refuse to license directly. Accordingly, said CBS, the blanket license should be condemned as block-booking and price-fixing.

The evidence at the trial destroyed CBS' factual contentions. Undisturbed findings of fact by the District Court established that CBS *could* acquire the licenses it wished in direct negotiation with ASCAP members, and that ASCAP's members *would* compete on a price basis for individual compositions if CBS sought direct licenses from them.

The District Court's findings, after an eight-week trial, were explicit (App. B, pp. 111a-112a, 115a):

> "CBS has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS's door if it announced plans to drop its blanket license.
>
> * * *
>
> ". . . CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

Turning to the legal issues, the District Court wrote (App. B, p. 40a):

> "In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., United States v. Socony-Vacuum Oil Co., Inc., 310 U. S. 150, 60 S. Ct. 811, 84, L.Ed. 1129 (1940); United States v. Trenton Potteries, Co., 273 U. S. 392, 47 S. Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.
>
> "The claim fails as a matter of law."

The District Court's conclusion that CBS' claim failed "as a matter of law" was premised on its reading of two decisions of this Court, *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950) and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). To the District Court, these cases teach that "[T]he critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor."

Since there was no compulsion in the blanket license which ASCAP made available to CBS and other television networks on their request, since CBS had a free and real choice between dealing with ASCAP and dealing with the individual members, the District Court dismissed the complaint.

The Court of Appeals

The Court of Appeals accepted every finding of fact made by the District Court in its 46-page opinion. The Circuit Judges agreed with Judge Lasker that the proven absence of coercion disposed of any claim of illegal tie-in or block-booking. But a majority of the Court of Appeals (Gurfein & Anderson, JJ.) held that the mere offering of a blanket license by ASCAP—even though ASCAP's members were willing to deal individually and even though ASCAP was required to offer blanket licenses by the Amended Final Judgment—was an act of price-fixing as a matter of law, and so illegal *per se*. Judge Moore, in an opinion termed a concurrence, refused to agree that the blanket license was price-fixing.

In its statement of the issue, the majority made plain that its ruling had impact far beyond the music-licensing business (App. A, p. 11a):

> "The charge that there is a restraint of trade by price-fixing is founded upon the conception that when *any* group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained" (emphasis added).

Disregarding the realities of the music business as revealed in the lengthy trial record, the majority reached this simple conclusion (App. A, p. 12a):

> ". . . even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)."

The majority offered only this rationale (App. A, pp. 20a, 22a):

> "... the very availability of the blanket license itself involves the fixing of a collective price which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete.
>
> * * *
>
> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete" (emphasis in original).

The Court of Appeals here made two basic errors. First, it is the user, not the member, who "chooses" whether to deal with ASCAP or the member. Second, the Court of Appeals grounded its decision only upon its *ipse dixit* that the "blanket license dulls his incentive to compete"—in preference to the undisturbed finding of the District Court that ASCAP's members would not be "disinclined" to deal with CBS for direct licenses but, rather, "would wait at CBS' door" (App. B, p. 112a).

As we have seen, the majority does not view its unprecedented ruling narrowly: when *any* group of sellers make their collective products available through a single agency, at a single price, they engage in price-fixing which is unlawful *per se*, even though each seller remains willing to negotiate an individual price for his product.

Having thus found price-fixing where price-fixing had never been seen before, and having extended the concept of *per se* illegality beyond all prior bounds, the majority abruptly did an about-face and created a new defense to price-fixing. It ruled that a common selling agency with a single price might be saved from *per se* illegality by a

"market necessity." The Court did not find it necessary to analyze how the seeming antipodes of *per se* illegality and "market necessity" justification might be brought into congruence: here, said the majority, there was no "market necessity" for the blanket license because, as the District Court had found, direct dealing between CBS and ASCAP members was entirely feasible.

And so ASCAP and its members, by reason of their making the blanket license available to CBS, were guilty of price-fixing. And their problems did not end there: in a footnote, the Court said: "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim."*

The liability of ASCAP and its members thus resolved, the Court did another turnabout. Instead of enjoining the *per se* illegal blanket license, the Court said (App. A, pp. 22a-23a):

> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.
>
> "We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith."

The *per se* illegal blanket license may, then, perhaps still be saved if the District Court can fashion "some form

* Since March 31, 1978, CBS has been performing ASCAP music on its television network without license from ASCAP or any member—and without paying. CBS' counsel has stated that, if sued for infringement, it will defend with a claim of "misuse" based upon the Second Circuit decision.

of per use" license to be issued by ASCAP. The Second Circuit did not explain why a per use license, with ASCAP setting the rates, would be any the less "price-fixing" than a blanket license—nor why, if the members set the rates, the per use license would offer anything more than, or different from, that which the individual members offer today.

Following the decision, defendants applied unsuccessfully for rehearing, and now file this petition.

Reasons for Granting the Writ

I.

The decision below will create major problems of judicial administration and turmoil in music licensing.

The most basic reason for granting the writ is that the errors of the court below are so significant that, unless corrected, they will create major problems of judicial administration and will create turmoil in the music licensing business for years to come.

The Errors

The court below erred in at least three respects: it held to be price-fixing and copyright misuse conduct which had never before been so perceived; it applied the label of *per se* illegality based on assumptions of fact contradicted by the undisturbed findings of the District Court; and then it set at naught the entire concept of *per se* illegality by creating a "market necessity" exception.

The Court viewed ASCAP and all other common sales agencies which set package prices as falling within the ban of *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940), against "[a]ny combination which tampers with price structures."

Neither *Socony-Vacuum* nor any other authority requires or supports this extreme result.

ASCAP, in making available the blanket license, does not tamper with price structure and does not engage in price-fixing. For it is the essence of price-fixing that the price-fixers "fix"—that they agree either (a) to observe the established prices and not to compete with each other in price terms, or (b) to engage in conduct, as in *Socony-Vacuum,* the purpose and necessary effect of which is to fix and maintain prices. (Price-fixers may, of course, welsh on their agreements, and often do, but it is the agreement which is the essence of the wrong.) ASCAP's members undertake no such commitment: according to the findings of the District Court, they stand ready and willing to deal individually with CBS or anyone else and to negotiate prices quite unrelated to ASCAP's blanket license. This being so, there is no tampering with price structure, no price-fixing as that term has ever before been used by any court.

In reaching its result, the Second Circuit did not cite and certainly did not consider this Court's teaching in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977):

> "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive."

This test was reaffirmed only last month in *National Society of Professional Engineers* v. *United States,* 46 U.S. L.W. 4356, 4359 (U.S. April 25, 1978), where the Court said that agreements are *per se* illegal only when their "nature

and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."

Here, we had an eight-week trial at which the industry was studied in every detail. The District Court found, on that full record, that ASCAP's members were both willing and able to compete—all CBS had to do was ask.

These findings do not permit—they refute—a ruling of *per se* illegality.

Common sales or buying agencies, and other arrangements among competitors which are really anticompetitive, unlike the ASCAP blanket license, have been held permissible under the Rule of Reason—and so not *per se* illegal. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960); *United States* v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); *In re Associated Greeting Card Distributors, et al.*, 50 F.T.C. 631 (1954); *see* Bork, *The Antitrust Paradox* 263-7 (1978); L. Sullivan, *The Law of Antitrust* 207-8, 298 (1977).

Under these authorities, the Second Circuit was clearly wrong in measuring ASCAP's activities by a *per se* test rather than the Rule of Reason.

Nor did the Second Circuit satisfactorily answer the District Court's position that *Automatic Radio* and *Zenith Radio*, read together, teach that package licensing agreements are lawful when made for the convenience of the parties, without coercion. The Court of Appeals claimed to find a distinguishing feature in the fact that "these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved"—by contrast with ASCAP, which licenses on behalf of its many members, who separately own their copyrights. But this is a distinction without a real difference: surely Hazeltine had acquired its patents by assignment from the original patentees, and surely it makes no sense, economic or legal, to penalize ASCAP's members for not assigning their copyrights to ASCAP.

The court below tried to find support for its "market necessity" exception to *per se* illegality in a memorandum submitted to this Court by the Solicitor General in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U. S. 1045 (1968) (discussed *infra*, pp. 20-22). The Solicitor General, urging this Court not to review the Ninth Circuit's decision that ASCAP's conduct was lawful, said this:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created."

Memorandum of the United States as Amicus Curiae at 10-11 (No. 67-147, 1967 Term). To us, this is an invocation of the Rule of Reason, not of any doctrine of *per se* illegality with a "market necessity" out.*

There is the strongest reason to conclude, then, that the Second Circuit erred in holding the ASCAP blanket license both *per se* illegal and a misuse of copyrights.

Impact on Antitrust Cases

Consideration and correction of these errors is required, we submit, not only in the interest of the parties but also because of the impact the decision will have on other cases.

---

* If there be any doubt, we would urge the Court to ask the Solicitor General for his views in this case, as was done in *K-91*, 389 U.S. 805 (1967).

First, the decision represents an expansion of the doctrine of *per se* illegality—by one of the nation's most active antitrust courts—when this Court has indicated that the doctrine is to be applied only with great care. The result can only be confusion.

Further, the Second Circuit's ruling casts a shadow over every common selling agency which establishes package prices. Many examples occur, but one particularly close to home is the CBS television network: it is a common selling agent of advertising time for its 200 local stations and, simultaneously, a common buying agent of programs for performance on those stations. As buyer and as seller, the network—not the individual station—negotiates the package fee. If ASCAP's blanket license is unlawful despite the members' willingness to negotiate individually, then equally unlawful are CBS' operation and the operations of the other national networks, despite the affiliates' freedom to refuse a network program and to deal directly with an advertiser or a program supplier.

And equally unlawful are all common selling agencies which sell packages, the components of which come from different sources.

"Market Necessity"

The Second Circuit added to the confusion its decision would otherwise have created by its espousal of a "market necessity" exception to the rule that price-fixing agreements are *per se* illegal. Of course this was dicta, but it was carefully and extensively considered dicta and, unless corrected, is likely to have pernicious effects. The notion that some price-fixing is "good" is bound to be seized upon as a defense by price-fixing defendants generally. Nor will it make a difference that few defendants, if any, will

be able to make the defense stand up—under the decision below, the defense will be an appropriate subject for litigation, thereby frustrating the effort toward judicial economy which the *per se* rules embody.

The two major law reviews which have commented on this case could hardly have been more critical of the "market necessity" exception. Said a Yale casenote, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 799 (1978):

> "The market function exception created in *CBS* threatens to swallow the per se rule. The exception to the per se rule would force the courts to examine the anatomy of the market in every case where the defense is raised, thus defeating the simplifying purpose of per se rules."

Harvard said, *The Middleman as Price Fixer*, 91 Harv. L. Rev. 488, 498 (1977):

> "The court offers no guidance for interpreting the concept of market necessity. In particular, it fails to distinguish between cases where the pricing effect is merely ancillary to a necessary activity, and those where the price fixing itself is claimed to be necessary for some purpose. The market necessity exception may therefore lend credence to those general defenses of price fixing that have long been excluded—and properly so—by the per se rule."*

---

* Harvard thought the entire decision untenable. Typical is this observation, *id.* at 497:

> "The court's need to create an exception to the price-fixing rule clearly reveals the deficiencies in its view of price fixing. Not only does the recognition of any such exception run contrary to the basic idea of a per se rule, but the fact that the blanket license is absolutely necessary in some circumstances suggests that it is not *inherently* harmful at all" (emphasis in original).

Yale thought the blanket license unlawful, but so clearly desirable that it should be legalized by legislation.

Impact on the Music World

The decision below holds particular menace, of course, for the music licensing world. The blanket license, because of its convenience and simplicity, is used in all countries which recognize copyright. But the Court of Appeals has declared that the entire artistic and economic community of music writers and publishers in this country and the rest of the world—from Aaron Copland to Roberta Flack to Sir Ralph Vaughan Williams to Edith Piaf—are price-fixers and guilty of copyright misuse because of their membership in, or relation to, ASCAP.

In these circumstances, everyone will be at total disadvantage. ASCAP and its members will be able to issue a blanket license only on peril that the licensee will later denounce the license: he may claim, like CBS, that no "market necessity" existed for the blanket license he requested and signed, that it was therefore *per se* illegal, that the copyrights involved have been misused and accordingly are unenforceable, and that he is entitled to treble damages.

There are problems not only for ASCAP and its members, but for the user of music as well. Users are willing, we may assume, to pay a fair price for the right to perform music. They have always wanted the convenience of the blanket license—why should they not have it?

But should ASCAP and its members continue to make the blanket license available? Should they run the risk of the licensee's later discovery, on the advice of counsel, that he has been a victim of *per se* illegality?

To call this situation turmoil is, we submit, to understate.

The Burden on the Courts

The turmoil must surely impact upon the courts. Until the Second Circuit's ruling, the legal affairs of the music licensing world were conducted with economy of judicial time. True, the District Court for the Southern District of New York had continuing responsibility under the ASCAP Amended Final Judgment for supervision of ASCAP's affairs. But the expenditure of judicial energies over the years has been modest: the mere existence of the court as an ultimate rate-fixing authority resulted in the settlement of every rate-fixing proceeding ever instituted.

Under the Second Circuit's ruling here, however, a plethora of litigation seems inevitable. Even though the Second Circuit decision is directed only to television networks, every user of ASCAP music will be encouraged to assert—in a plenary antitrust action whenever and wherever he chooses—that the federal court he chooses must devise a "per use" license for him and that he need pay nothing for what he has freely used.

This is no exercise in speculation. Such claims have already been asserted by local television and radio stations asserting their entitlement to special licenses because the ASCAP blanket license violates the antitrust laws. More such actions (and counterclaims to infringement actions) must surely be expected—involving not only broadcasters but other users of ASCAP music who share a common characteristic: a curiosity to find out in court whether they can really get something for nothing.

In the interest, then, of economy of judicial administration; as well as of the reasonable enjoyment and use of music copyrights, the decision below requires review.

II.

The decision below conflicts with decisions of the Ninth Circuit.

The majority decision below is in direct conflict with two decisions of the Ninth Circuit, *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (1967), *cert. denied*, 389 U. S. 1045 (1968); and *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on decision below*, 541 F.2d 226 (1976), *cert. denied*, 430 U.S. 915 (1977).

K-91 holds squarely that ASCAP's blanket license is not illegal price-fixing. And *Cook Paint* holds that *Socony-Vacuum* does not really mean that every agreement which has any conceivable impact on price is *per se* illegal—any more than every agreement which in any way restrains trade is a violation of Section 1 of the Sherman Act. *See National Society of Professional Engineers v. United States*, 46 U.S.L.W. 4356 (U.S. April 25, 1978); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This Court should grant certiorari, we submit, to resolve the conflict of circuits thus presented.

In *K-91*, ASCAP members sued a radio broadcaster for copyright infringement and won. Defendant argued that ASCAP was an unlawful price-fixer; the Ninth Circuit disagreed.

The Second Circuit, in the case at bar, said that it had no quarrel with the Ninth Circuit's "result" in *K-91*—there was a "market necessity" for the blanket license in the case of the *K-91* radio broadcaster, said the Second Circuit, and so the price-fixing by ASCAP in the blanket license could be justified.

But that is not the route which the Ninth Circuit took. The Ninth Circuit said, rather, that ASCAP did no price-

fixing: since the ASCAP offer of a blanket license was subject to judicial determination, under the Amended Final Judgment, of the reasonable fee for that license, ASCAP was not the "price fixing authority," 372 F.2d at 4.

The Ninth Circuit held on still another score that ASCAP's conduct was lawful, 372 F.2d at 4:

> "There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

Thus, in the Second Circuit, ASCAP is a price-fixer; in the Ninth Circuit it is not. In the Second Circuit, the willingness of ASCAP's members to deal individually does not save them from a charge of illegal combination; in the Ninth Circuit it is exculpation.

This is conflict.

The Circuits are at odds also on the proper scope of *Socony-Vacuum*. The Second Circuit, as we have seen, treats the case as making illegal *per se* any action which in any way "tampers with price structures." The Ninth Circuit, in *Cook Paint*, took a position far more consistent with this Court's view of the proper role of the *per se* doctrine. There, plaintiffs attempted to challenge under the antitrust laws defendants' cooperative advertising campaign. The advertising contained misrepresentations, said plaintiffs, and the necessary consequence of these falsehoods was to raise prices—which plaintiffs, relying on *Socony-Vacuum*, asked the trial court to hold illegal *per se*. The trial court (Renfrew, J.) refused, saying that price-fixing is only that conduct "whose actual purpose is to affect or regulate prices," 391 F. Supp. at 967. The Ninth Circuit affirmed on the opinion below.

In the Ninth Circuit, then, it is not illegal *per se* under the Sherman Act to combine in a false advertising campaign—it may not be praiseworthy conduct, but it is not price-fixing. In the Second Circuit, by contrast, the mere offer of a bundle of products at a package price is price-fixing and is *per se* unlawful, without the slightest proof that the sellers ever conceived—or that there would be in fact—any effect on price.

This divergence of view on the proper scope of *per se* illegality calls for this Court's reconciliation.

Conclusion

There remain two final reasons why this Court should intervene in this case now to set matters aright.

First, there is a basic unreason in the assumption that antitrust doctrine which makes sense in dealing with steel and widgets will necessarily make equal sense and produce results equally desirable when we attempt to apply it to the behavior of those who create and perform music. Do composers compose only for money—or because, like poets, they have little choice? Will they behave like economic man in negotiating prices for the performance of their music—or will they sell performing rights at almost any price, for the pleasure of hearing their works performed? And even the iron-fisted CBS producer—will he use the composition he can get for $699.50 or will he pay $850 because there is a bit of the artist in him too?

These questions have no answers of which we are aware. They suggest only that it is probably appropriate to go slow in applying *per se* rules of illegality to the arts—just as, in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788-89, n.17 (1975), this Court said that "[t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act."

Finally, we submit, this Court should intervene now because this case has already taken up far too much court time in a controversy which seems almost to have come from the theatre of the absurd. We are here, after all, in this context:

> CBS says it does not want an ASCAP blanket license.
>
> ASCAP offers only the blanket license.
>
> CBS could get all the licenses it needs from ASCAP's members, if only it would ask.
>
> CBS has never asked.

Therefore, according to the court below, CBS has the right to continue to burden the courts with this eight-year-old litigation in order to compel ASCAP to offer to CBS a "per use" license which no one has ever seen and which CBS may well decide not to take when it sees what it is.

We hope this Court will disagree.

We ask this Court to grant certiorari and, upon that grant, to vacate the decision of the Court of Appeals and reinstate the judgment of the District Court dismissing the complaint.

May 5, 1978

Respectfully submitted,

JAY TOPKIS
BERNARD KORMAN
Attorneys for Petitioners American Society of Composers, Authors and Publishers, et al.

Of Counsel:

ALLAN BLUMSTEIN
MAX GITTER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners American Society of Composers, Authors and Publishers, et al.

Of Counsel:

ALLAN BLUMSTEIN
MAX GITTER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

TABLE OF CONTENTS

Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 24, Docket 75-7600.

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

(Argued October 14, 1976; Decided August 8, 1977.)

Alan J. Hruska, New York City (*Robert K. Baker, J. Barclay Collins, II, Robert M. Sondak, Kenneth M. Kramer, Cravath, Swaine & Moore*, and *John D. Appel*, New York City, *of counsel*), for plaintiff-appellant.

Amalya L. Kearse, New York City (*George A. Davidson, Pamela R. Chepiga* and *Hughes, Hubbard & Reed*, New York City, *of counsel*), for defendants-appellees, Broadcast Music, Inc., et al.

Jay H. Topkis, New York City (*Allan L. Blumstein, Max Gitter, Richard Reimer, Paul, Weiss, Rifkind, Wharton & Garrison, Bernard Korman*, New York City, *of counsel*), for defendants-appellees, American Society of Composers, Authors and Publishers, et al.

Before MOORE, ANDERSON and GURFEIN, *Circuit Judges.*

GURFEIN, *Circuit Judge*:

The subject-matter of this appeal has been painstakingly set forth with clarity in the opinion of the District Court (Honorable Morris E. Lasker, Judge), 400 F.Supp. 737 (S.D.N.Y. 1975), and we refrain from restating the details of the evidence adduced at trial. We refer to that opinion for the evidence supporting the findings.

Columbia Broadcasting System, Inc. ("CBS") is a national television network, of which there are two others, National Broadcasting Company ("NBC") and American Broadcasting Company ("ABC"). CBS has brought this antitrust action against the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and their members and affiliates.[1] These members and affiliates are writers and publishers of musical compositions.[2] ASCAP and BMI license the non-dramatic performance rights in their compositions.[3]

1. The references hereafter to ASCAP or appellant shall be taken to include BMI, unless the context clearly indicates otherwise. CBS was one of the founders of BMI in 1939. It gave up its stock interest in BMI in 1959, as have the other two networks. BMI in [*sic*] still owned by individual broadcasters. CBS is the parent of CTN, the Columbia Television Network.

2. "Writers" is a generic term which describes both those who supply the music, the composers, and those who supply the lyrics, the authors. *See Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322, 326 n.5 (S.D.N.Y. 1959).

3. These non-dramatic rights are called the "small" rights of musical compositions as opposed to the "grand" or dramatic rights. For a discussion of the distinction between these terms, *see* 2 *Nimmer on Copyright* §125.6 (1976). For our purposes it is enough to note that while ASCAP could normally license the performance of a song from, for example, *My Fair Lady*, it could not license the

(footnote continued on next page)

ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a *negotiated* fixed annual fee. CBS contends that this method of licensing violates §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and constitutes copyright misuse.[4] CBS sought an injunction under §16 of the Clayton Act, 15 U.S.C. §26, directing ASCAP and BMI to offer CBS performing rights licenses on terms which reflect the actual use of music by CBS, or, alternatively, enjoining them from offering blanket licenses to any television network. CBS also sought a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202. The District Court, after a trial without a jury on liability alone, dismissed the complaint, and CBS appeals.

In dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*. Analogy may be sought in each field, but the practical complexities of licensing musical

song in the context of a performance in whole or part of the play itself. Apparently, most uses of a musical composition by broadcasters, nightclubs and restaurants would be considered non-dramatic and therefore subject to license by ASCAP. Throughout this opinion references to "performing rights" refer only to performing rights for profit in non-dramatic performances.

4. Sections 1 and 2 of the Sherman Act state in relevant part:

"§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

"§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

non-dramatic performing rights can find no precise analogy anywhere. In the case of ordinary products, persons who use them without paying for them are generally thieves. In the case of infringement of performing rights in musical compositions, the infringement can be wholly innocent or due to the pressure and difficulty of obtaining timely clearance by individual license. This infringement aspect, unknown elsewhere, except to some extent in the field of patents, makes the music industry *sui generis.*

I

A summary history of ASCAP's difficulties with the antitrust laws will enable us to focus on the limited but difficult questions presented on this appeal.

In 1934 the Department of Justice filed suit against ASCAP seeking its dissolution and charging, *inter alia,* that through its pooling of individual copyrights ASCAP had the power to, and did, dominate the radio broadcasting industry.[5] However, after two weeks of trial, the Government received a continuance and the case remained dormant thereafter.

In 1941 the Government sued ASCAP and BMI as unlawful combinations on the principal ground that the annual blanket license (which was the *only* license then offered by ASCAP and BMI) was in restraint of trade. The complaint also charged that arbitrary prices were being ob-

5. *United States* v. *ASCAP*, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934). *See* Note, "Musical Monopolies and Legislative Control," 53 Harv. L. Rev. 458, 459 (1940); Note, "Anti-ASCAP Legislation and Its Judicial Interpretation, 9 Geo. Wash. L. Rev. 713, 720 (1941).

tained for the blanket licenses by the illegal pooling of copyrights. The Government sought an order enjoining, *inter alia,* ASCAP's *exclusive* licensing and requiring a form of *per use* licensing.

A consent decree resulted in 1941 by the terms of which ASCAP could no longer assert the *exclusive* right to license performing rights and could no longer interfere with *individual* licensing by its members. But the latter provision was itself illusory, because if the member licensed performing rights in his own copyright, he nevertheless had to pay the royalties derived therefrom into the ASCAP pot, thus affording little incentive for licensing by the individual member.[6]

Soon after the 1941 consent decree, ASCAP was sued by two hundred motion picture theatre owners for violation of Sections 1 and 2 of the Sherman Act. The problem was special to the theatre exhibition industry which was required at that time to take an ASCAP blanket performance license in order to exhibit motion pictures, the synchronized music of which had *already* been licensed to the motion picture producer. The specific holding by Judge Leibell in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F.Supp. 888 (S.D.N.Y. 1948), was that it was unlawful for ASCAP to require the motion picture producer to contract with distributors that the film would be shown only in theatres having an ASCAP *performance* license. In broader terms, the decision held that ASCAP was a combination in restraint of trade be-

6. *See* Section 11 (I) of the 1941 Decree, *United States* v. *ASCAP*, 1940-43 CCH Trade Cases ¶56,104 at 403 (S.D.N.Y. 1941); Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950," 19 Law & Contemp. Prob. 294, 320 (1954).

cause the members had transferred all their non-dramatic performing rights to ASCAP and were barred from individually assigning such rights to motion picture producers. 80 F.Supp. at 894. *See also M. Witmark & Sons* v. *Jensen*, 80 F.Supp. 843, 849 (D.Minn.1948).[7]

At about this time, the Government began to renegotiate the consent decree with ASCAP. The amended consent decree reflected two important changes. First, ASCAP, unlike its position under the 1941 decree, was no longer permitted to interfere with the right of any of its members to issue a direct license to a user. The royalty so obtained did not have to go into the ASCAP pot for later distribution on some formula basis. Second, although ASCAP was still not required to issue per use licenses for broadcasters, it was required to issue per program licenses and not to discriminate against their free selection by licensees.[8]

The per program license is simply another form of blanket license. Both it and the "annual" blanket license permit use of any composition in the ASCAP inventory, and both permit payment by a fixed percentage of advertising revenues or a "flat" fee. The difference is that under the annual blanket license, the payment remains the same for the year regardless of whether all or none of the network's programs use ASCAP compositions, while under the per program license the fee is determined by the number of programs using ASCAP compositions. However, neither permits the licensee to pay only for those composi-

7. The *Alden-Rochelle* decision, *supra*, dealt only with performing rights in motion picture theatres.

8. *See United States* v. *ASCAP*, 1950-51 CCH Trade Cases ¶62,595 at 63,753-754 (S.D.N.Y. 1950).

tions which it actually uses, and the per program license should not be confused with a per use license.[9]

In strengthening the per program alternative, the amended decree prohibits ASCAP from requiring or influencing the licensee to negotiate for an annual blanket license before negotiating for a per program blanket license, and prohibits discrimination against its use by price differentials. If the licensee and ASCAP cannot agree upon a fee, the matter is left to the District Court to determine a "reasonable fee." And a prospective licensee is theoretically free to negotiate for non-exclusive performance rights with any ASCAP member, without interference by ASCAP. But ASCAP is presently not free to negotiate for licenses for the performance of particular music without the specific consent of the ASCAP member.

Though CBS acquiesced in this arrangement for many years, it decided, some years ago, that it was being denied the right to pay only for the music it uses. It could not, by itself, attempt to amend the decree. Instead, it brought this action, as it was entitled to do.[10] In the meantime,

9. Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.

The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming. In any case, we understand that all three networks and virtually all commercial television stations in the United States hold "annual" blanket licenses.

Under a per use license, on the contrary, the user would pay only for those compositions actually used during the program.

10. *See Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689-90, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); *United States* v. *ASCAP* (*Shenandoah Valley Broadcasting, Inc.*), 331 F.2d 117, 124 (2d Cir.), *cert. denied*, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048 (1964).

NBC and ABC, while they may have other grievances, have not joined in this attack on blanket licensing to the networks.[11]

II

CBS contends that the blanket licensing method is not only an illegal tie-in or block-booking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation of Sherman Act §1 in restraint of trade.

Judge Lasker, treating the case essentially as a tie-in or block-booking case which required proof of coercion to establish illegality, held that the provision of the consent decree allowing direct licensing for use by the individual copyright owners saved the scheme from being coercive and, hence, illegal. He found that the right of CBS to negotiate with individual copyright owners was not impractical, even if the blanket licensing system were not enjoined, but rather that the evidence indicated that if CBS chose to do so, it could obtain the performing rights it needed for use in a direct negotiation market without having to take a blanket license from ASCAP.[12] On that

11. We note, however, that both ABC and NBC have specifically retained the right to transfer to a per use license from a blanket license, but only in the event that CBS receives a per use license from ASCAP.

12. Judge Lasker had the benefit of the expert testimony of three distinguished economists, Franklin M. Fisher for CBS, Robert Nathan for ASCAP and Peter O. Steiner for BMI. The experts disagreed sharply on the likely future action of a direct negotiation market. Judge Lasker essentially accepted the Nathan view. He found that the market forces would tend to create a licensing

(footnote continued on next page)

basis, as well as on his conclusion that there was no unlawful price-fixing, he dismissed the complaint.

Without commenting in detail on the evidence contained in the twenty-four volumes of the Appendix, we note that there was conflicting testimony by witnesses from the music industry and by expert economists on each side. We recognize that not all network needs for music would encounter the same difficulty in procurement. Thus, theme or background music is often original music created by a composer on a salary basis for a packager of the program or for the network. In such case, individual negotiation for the performing rights would not be difficult. Where the theme or background music has already been published, the name of the publisher is easily available. In the case of "feature" performances on variety shows, the obtaining of performance rights does involve some uncertainty. Situations may indeed arise where the writer's consent is required and would be hard to get. However, even in this area CBS could require the outside packager or producer to obtain the performance rights when he obtains the synchronization rights.[13]

agency similar to the Harry Fox Agency which handles synchronization rights. There was testimony that it would take probably six months to a year after CBS' announcement of its intention to go to direct licensing for a viable market to emerge and that, in the meantime, there would be some disinclination to deal with CBS with some attendant confusion. Mr. Nathan frankly conceded, however, that there is no actual evidence of the characteristics of a direct negotiation market in these circumstances, for it has never been tried.

13. The writer generally assigns the right to license performing rights to the music publishers. Under the American Guild of Authors and Composers form contract, publishers are required to obtain an AGAC writer's consent for television synchronization

(footnote continued on next page)

The conflicting predictions at the trial obviously involved psychological as well as economic factors, and the economic theory presented was an amalgam of the two. Prophesying the future is one of the less satisfactory tools of the judicial process. Suffice it to say that our review leads us to the conclusion that the essential finding of the District Court that such a market can exist is not clearly erroneous.[14]

licenses for songs over ten years old, and motion picture synchronization licenses for vocal use of a composition. The District Court, based on the testimony, found that "[t]here is every reason to believe that most writers would either give their publishers blanket consent for performance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights." 400 F.Supp. at 761. The upshot is that, as a practical matter, the networks would generally deal with publishers or through brokers or agencies of the publishers, rather than composers. *See* 400 F.Supp. 760-62.

14. CBS also calls attention to one historical situation and to one current situation in support of its thesis that a direct negotiation market will not work. It contends that when Minnesota Mining and Manufacturing Company tried to negotiate individual licenses for performing rights on an experimental background music project, it allegedly met with frustration. The District Court found, however, that CBS' allegations concerning that situation were overstated and, in any case, did not support CBS' contentions here. 400 F.Supp. at 771-75. Its finding is not clearly erroneous.

CBS also raises a subsidiary problem dealing with "music in the can." Each network now has a large inventory of recorded programs and motion picture films containing music for which it has synchronization rights but no performing rights other than those afforded by the ASCAP blanket license. CBS contends that since it lacks performing rights the copyright proprietor would have an enormous leverage to exact a premium, because, in the absence of a blanket license, appellant could not telecast the motion picture without the music owner's consent. There is a good deal of speculation in the record on what would happen to the amount of royalty for "music in the can" in various hypothetical situations, including testimony that CBS is so powerful a buyer that publishers could not afford to get into its bad graces. This is a question of fact and the

(footnote continued on next page)

While this finding of the District Court that there is indeed a viable alternative to the blanket license disposes of the charge that the blanket license involves an illegal tie-in or block-booking, *see, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); 17 U.Chi.L.Rev. 183 (1949); Timberg, *supra* note 6 at 300, it does not resolve the charge of restraint of trade by the fixing of prices.

The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.[15] His dis-

District Court found that "CBS has not proven that its fears of a 'holdup' by copyright proprietors are justified." 400 F.Supp. at 776. In any event, it is hard to see how "music in the can" problems will be solved by an injunction against blanket licensing. The individual licenses would still have to be negotiated with some of the same economic problems involved.

15. ASCAP distributes about $1,000 ($400-$500 to the publisher or publishers; $400-$500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses). The royalty is fixed by ASCAP and not by the licensee.

Paragraph XI of the 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to

(footnote continued on next page)

tributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a "combination which tampers with price structures [and therefore] engage[s] in an unlawful activity." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).[16]

There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition, and Judge Lasker found that musical compositions, though not fungible, do fall into classes, so that one composition in a particular class may serve the network as well as another in the same class. 400 F.Supp. at 751-52. There is, moreover, some analogy to the patent pooling cases which broadly hold that the pooling of competing, and perhaps even non-competing, patents is illegal. *See United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Line Mate-*

the performance of the compositions . . .." Under the 1960 amendment, writers also have the option of receiving royalties under a plan which compensates them additionally for length of membership and the recognized status of their works. *See* 1960 Consent Decree, Section III(A) and Part I of Attachment A, *United States* v. *ASCAP*, 1960 CCH Trade Cases ¶69,612 at 76,469-470 (S.D.N.Y. 1960).

16. And, of course, it has long been held that the fact that "the object of sale is the creation or product of a man's ingenuity does not alter this principle." *Associated Press* v. *United States*, 326 U.S. 1, 15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013 (1945). *See Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

rial Co., 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701 (1948).[17] While these cases involved resale price-maintenance agreements, the broad language of the opinions treated the patent pooling agreement as itself unlawful.[18]

Price-fixing, as we have been instructed, is generally unlawful per se. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221, 223, 60 S.Ct. 811; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). Yet it may be that in some circumstances market requirements would require the acceptance of some form of price-fixing. In fact, both the plaintiff here, CBS, and the Department of Justice, which is charged with enforcing the Sherman Act, recognize in the case of ASCAP blanket licenses what CBS has termed the "Per Se Rule with a Market-Functioning Exception." In short this concept holds that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all.

The question was addressed by the Government in the case of *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). That was an action for copyright infringement brought by several ASCAP members against a radio broadcaster operating in the state of Washington. The broadcaster defended in part on the assertion that ASCAP's price-fixing as well as its commission of other

17. Hence, on the surface, the pool of copyrights may be analogized to a pool of competing patents.

18. *See United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 377, 380, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Line Material Co.*, 333 U.S. 287, 308, 68 S.Ct. 550, 561, 92 L.Ed. 701 (1948) (illegal "whether it is a price agreement between *producers for sale* or between producer and distributor for resale") (emphasis added).

antitrust violations constituted copyright misuse. It also counterclaimed for treble damages and injunctive relief. The District Court held that the copyrights were infringed and that the defense and counterclaims were insufficient. The Ninth Circuit, in affirming, rejected the antitrust defense.

In *K-91* the parties recognized that there was a market need for blanket licensing for the single radio station there involved; indeed, they had stipulated that "[i]t would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations."[19]

On the petition for certiorari in an amicus brief, the Solicitor General, in approving the result reached by the Ninth Circuit, stated:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *United States* v. *St. Louis Terminal*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933); *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). This case appears to

19. The stipulation is quoted in Judge Lasker's opinion below on ASCAP's motion for summary judgment. *Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F.Supp. 394, 400 (S.D.N.Y. 1972).

> us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.
>
> "If this market is to function at all, there must be —at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them."[20]

The Solicitor General recognized that for some broadcasters direct licensing might be possible and more desirable, and that technological changes, such as in computer technology, might eliminate the need for the blanket license. He found, however, that market necessity may justify "bulk licensing of recorded music" where no "practical alternatives exist"[21] and concluded that on the record in that radio-broadcasting case the ASCAP blanket license to the radio station did not violate the antitrust laws.

This "market necessity" concept, as a very limited and narrow exception to the per se rule against price-fixing, is not without merit. It would seem reasonable to conclude that Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, should be construed so as not

20. Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the Supreme Court of the United States, *K-91, Inc.* v. *Gershwin Publishing Corp.*, No. 147, dated December, 1967 at 10-11 ("Amicus Brief").

21. *Id.* at 13.

to prohibit the very trade it was intended to protect.[22] We do not quarrel, therefore, with the *result* reached by the Ninth Circuit in *K-91*.

In this case, by contrast, Judge Lasker found that, with respect to the television networks, a "practical alternative" —the free direct negotiation market—can exist *even beside* the blanket license. It would seem to follow *a fortiori* that the direct negotiating market can surely exist if the blanket license is eliminated.

The dilemma here is that if the blanket licensing system is viewed as block-booking, the *availability* of a direct negotiating market does save it from being "coercive." On the other hand, if the blanket licensing system is held to be price-fixing in restraint of trade, the very availability of a direct negotiating market would tend to make the blanket license less of a "market necessity." Curiously, though appellant now focuses its principal attack on the blanket license as a price-fixing device, it was appellant which throughout the trial tendered proof upon proof that a direct negotiating market posed *severe* practical problems. If that is true, such proof tends to demonstrate a *need* for the availability of an alternative blanket license. On the other hand, it was ASCAP which attempted to prove that a direct negotiating market can be made to exist even in competition with the blanket license. This raises the question, paradoxically, whether if that be true, the blanket license can nonetheless continue to be regarded as a market *necessity*. Thus, if we pose the issue as tie-in or block-booking, the

22. The narrowness of the exception is emphasized by the circumstance that it is difficult even to imagine another industry where such a "market necessity" defense would be applicable.

absence of coercion supports the view of the District Court if we accept its finding that a direct negotiating market is feasible. On the other hand, if we pose the issue as restraint of trade through price-fixing, the very finding that a direct negotiating market is feasible tends to undermine the need for the blanket license as a market *necessity*.

Several arguments have been advanced to refute the contention that the blanket license is itself a price-fixing mechanism in restraint of trade. The District Court met the price-fixing argument by suggesting that price-fixing has been sustained in patent cases in the absence of coercion. It cited *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), and *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), for the proposition that "the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor." 400 F.Supp. at 749. The *Hazeltine* cases did not involve a restraint of trade by price-fixing, however, for these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved. Coercion is simply not an essential ingredient of price-fixing. *Cf. United States* v. *Socony-Vacuum Oil Co., supra*, 310 U.S. at 225 n.59, 60 S.Ct. 811.

Another price-fixing defense asserted by ASCAP and accepted by the Ninth Circuit in *K-91* is that the consent decree insulated ASCAP against the restraint of trade charge on the ground that the price of the blanket license was "reasonable," since resort to the District Court was available to determine "reasonableness." That a price fixed by the agreement of competitors is "reasonable" is

not a defense, however.[23] Nor do we think that the determination of the "reasonableness" of the price by a *court* saves the price that has been fixed by a combination from continuing to be an unlawful device in restraint of trade, absent the justification of market necessity. In the *K-91* situation, the resort to judicial supervision was adequate for the simple reason that there was no other solution possible. The provision in the consent decree for resort to the District Court if there is a dispute on the reasonableness of the blanket license fee was highly desirable in the *K-91* situation, because there it represented a threatening veto to gross overreaching. On the other hand, when a competitive market *is* available, as the District Court found to be the case here, the determination of price by a judge can hardly be the equivalent of a price determined by a competitive market. For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces.

Nor is ASCAP "disinfected" by the Government consent decree, see *K-91, supra* at 4; such a decree does not "constitut[e] an implied partial repeal of the antitrust

23. *Cf. United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-97, 47 S.Ct. 377, 71 L.Ed. 700 (1927). We also note that the costs of litigating the issue of what is a "reasonable" fee in the Southern District of New York would discourage some users from taking advantage of this provision in the decree. In fact, in the 27-year existence of the provision, the consent-decree judge has never had to fix a "reasonable" fee for an ASCAP blanket license.

Finally, we note that this defense would not be available to BMI because its consent decree has no provision providing recourse to the District Court to determine a "reasonable" fee in cases of disagreement between the parties.

laws." 337 F.Supp. at 399-400. A consent decree has no such potency. Non-parties who did not participate in the settlement, and who are affected by ASCAP's activities may challenge them under the antitrust laws. *See Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689-90, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); *United States* v. *ASCAP* (*Shenandoah Valley Broadcasting, Inc.*), 331 F.2d 117, 124 (2d Cir.), *cert. denied*, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed. 2d 1048 (1964).

As the Supreme Court has noted, subsequent to the *K-91* decision, a consent decree, as it affects the parties themselves, is simply a compromise based on many factors. *United States* v. *Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). In historical fact, the government lawyer who negotiated the 1950 decree has stated that the "District Judge who entered the judgment, in conformity with the prevailing practice, gave no indication as to the legality or illegality of ASCAP's past organization or contemplated reorganization, or of its old or new practices." *Timberg, supra* note 6, at 295 n.2. And more recently, as the Solicitor General noted in his amicus brief in *K-91*: "[p]rivate parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government."[24] The Government consent decree does not insulate ASCAP from the claims of private plaintiffs.[25]

24. *See* Amicus Brief, *supra* note 20 at 14.

25. We do not imply that a government consent decree should be given no weight at all, especially since the Department of Justice has the responsibility for enforcing the Sherman Act. But it is not even clear that the problems presented in this action are coeval with those which surfaced almost 30 years ago when this decree was negotiated. We have had a more recent indication of the government's views, moreover, in its amicus brief in *K-91*.

Finally, ASCAP argues, as its basic premise, that the blanket license of the performance rights in *all* the copyrights in the Society's basket is so different from the performing right in each separate copyright that the claim of trade restraint by price-fixing is precluded. It urges that the collective activity necessary for the blanket license does not amount to price-fixing of the individual performing rights since the network can still bargain for such individual performing rights with each copyright owner separately. The argument that if one does not want the blanket license he need not take it is plausible. Yet the very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete. "[T]he fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act." *See Associated Press* v. *United States*, 326 U.S. 1, 17, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945).

ASCAP analogizes a blanket license to a symphony orchestra, in which the ensemble is different from the individual musicians and which may therefore lawfully command a price which is different and higher than the price for each musician's performance. The fallacy is that when the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the con-

tributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license.

We therefore conclude that the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense. It therefore constitutes a violation of §1 of the Sherman Act. We accordingly reverse the District Court's dismissal of the complaint.[26]

III

The trial below was on liability alone, and in view of the dismissal of the complaint no separate evidence was taken on remedy. In reversing the dismissal of the complaint we do not fashion the remedy. We think it useful, however, to offer some guidelines to the District Court in its selection of remedies.

Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all

26. In not reaching the same result as the Ninth Circuit did in *K-91*, we, in no way, intimate that we would have held the blanket license to the single radio station to be unlawful, or that the blanket licenses given by ASCAP generally are unlawful. The *K-91* result was, in our view, entirely justifiable as an example of market necessity. Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations.

circumstances.[27] The blanket license is not simply a "naked restraint" ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.[28]

27. We recognize that CBS contends that a blanket licensing system overhanging the market in any combination of circumstances will necessarily affect the price for each set of individual performing rights. On this record we are not convinced that this is necessarily so. And the District Court found the contrary.

CBS has asserted that an individual member of ASCAP, thrown into a direct negotiating market for the first time, will tend to measure the royalty he asks for a particular performing right by the royalty he has actually been receiving from ASCAP as his share under the blanket license. Considering the counterforce of the strong bargaining power of CBS, we cannot accept this as more than a theoretical assumption. Until some alternative method has actually been allowed to function for some time, contemporaneously with the blanket license, no man can say for certain that CBS' fears will prove inevitably to be true.

28. On remand, we think it would be appropriate for the District Court to invite the Department of Justice to participate or express its view on the appropriate remedy.

We also emphasize that in the foregoing discussion of remedy, "ASCAP" also includes appellant BMI. *See* note 1, *supra*.

We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith.[29] If the District Court considers it appropriate, it may fashion interim relief as well. No costs.

MOORE, *Circuit Judge* (concurring):

I concur in the majority's conclusion to remand for further proceedings so that such proof and argument as may be required, may be presented as will enable the court, and hopefully the parties as well, to evolve a practical method of adding to ASCAP's repertory per use licensing. Since future proceedings will be directed to that issue, my points of disagreement will not even rise to the status of that legal vacuity known as "dicta". However, I do not agree that "the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a 'market necessity' defense."

Market necessity is recognized by the majority as "not without merit" and certainly *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968), and the Solicitor General's accompanying amicus brief would support this view.

29. As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and "bypass" of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record.

We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim.

Appendix B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 69 Civ. 5740.

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS *et al.*,
Defendants.

(Filed September 22, 1975.)

LASKER, *District Judge.*

In this age of change the quality of life has been fundamentally altered and influenced by the development of the automobile, the computer and television.

Millions of viewers spend untold hours weekly viewing television. During the larger part of that time the viewer is a listener to programs which utilize music, whether as background, as theme or as a feature. This case relates to the method by which networks are licensed to use copyrighted music on television.

The Columbia Broadcasting System (CBS)[1] brings this antitrust action against the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI)and their members and affiliates.[2] It complains that the present system by which ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a flat annual fee violates the Sherman Act, 15 U.S.C. §§1 and 2. The complaint seeks an injunction under §16 of the Clayton Act, 15 U.S.C. §26, directing ASCAP and BMI to offer CBS performance right licenses on terms which reflect the nature and amount of CBS' actual use of music, or in the alternative, enjoining them from offering blanket licenses to any television network. CBS also seeks a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202.

1. CBS is engaged in a number of businesses, only one of which is the operation of the CBS television network (CTN). Although the parties distinguish between CBS and CTN in their post-trial submissions, for the sake of clarity we refer throughout this opinion to both the parent corporation and the network as "CBS."

I.

Introduction

A. The Parties

Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses. On

2. The other named defendants are certain members of ASCAP, as representative of the class of ASCAP's members: and certain BMI affiliates, as representative of the class of BMI affiliates. The case has heretofore been declared a class action against both classes.

the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform. ASCAP was organized as a "clearing-house" for copyright owners and users to solve these problems. The world of music has changed radically since 1914. Radio and television broadcasters are the largest users of music today; they "perform" copyrighted music before audiences of millions. In 1975 ASCAP and BMI licensed these large users, including CBS and the other networks as well as smaller ones such as concert halls and background music services.

Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a "blanket" license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is "automatically" covered by the blanket license.

ASCAP's current membership includes some 6,000 music publishing companies and 16,000 composers. Its members have granted ASCAP, as their licensing agent, the non-

exclusive right to license users to perform the compositions owned by them. ASCAP provides its members with a wide range of services. It maintains a surveillance system of radio and television broadcasts to detect unlicensed uses, institutes infringement actions, collects revenues from licensees and distributes royalties to copyright owners in accordance with a schedule which reflects the nature and amount of the use of their music and other factors.

BMI, a non-profit corporation, was organized in 1939 by members of the radio broadcasting industry, including CBS. It is affiliated with approximately 10,000 publishing companies and 20,000 writers and functions in essentially the same manner as ASCAP. Although CBS sold back its BMI stock to the corporation in 1959, BMI is still owned entirely by broadcasters.

As a practical matter virtually every domestic copyrighted composition is in the repertory of either ASCAP, which has over three million compositions in its pool, or BMI, which has over one million. Like ASCAP, BMI offers blanket licenses to broadcasters for unlimited use of the music owned by its "affiliates." Almost all broadcasters hold blanket licenses from both ASCAP and BMI.

As is generally known, CBS operates one of three national television networks, as well as AM and FM radio stations in seven major cities. It has held blanket licenses from ASCAP for its radio broadcast operations since 1928, and from BMI since soon after that organization was founded in 1939. It has held ASCAP and BMI blanket licenses for its television network on a continuous basis since the late 1940's.

CBS supplies television programs to approximately two hundred affiliated television stations throughout the country, and telecasts about 7,500 programs per year. Many of these programs make use of copyrighted music which is recorded on the soundtrack. However, CBS does not produce most of the programs seen on its network. Instead it purchases the right to broadcast programs produced by independent television production companies, known as "program packagers." Most of the popular prime-time serials fall into this category. In addition CBS itself produces a television serial ("Gunsmoke"), two day-time serials, a number of "specials," usually variety shows, as well as news, public affairs and sports programs.

Agreements between program packagers and CBS normally stipulate the price at which the packager will produce a program in a series and furnish it to CBS for broadcast. Pursuant to the agreements, packagers are responsible for obtaining and furnishing to CBS most rights necessary for the use of copyrighted music by the network, such as the right to record a copyrighted song in synchronization with the film or video tape ("synch" rights). However, program packagers do not, in the present scheme of things, furnish to CBS the right to *perform* the copyrighted music for profit as part of a television broadcast. Ever since television became commercially practicable in the late 1940's, CBS has obtained such "performance" rights for packaged programs, as well as for the programs it produces itself, from ASCAP and BMI by purchasing blanket licenses. From time to time it has renewed its licenses after negotiations with ASCAP and BMI. In the history of the parties the fee for the blanket license has been ex-

pressed in terms of a percentage of CBS' advertising revenues. For example, for many years prior to the institution of suit, the BMI blanket license fee remained at 1.09% of net receipts from sponsors after certain deductions. This resulted in payment to BMI of about \$1.6 million in 1969. For access to ASCAP's considerably larger repertory, CBS paid about \$5.7 million in 1969. Averaging the total of \$7.3 million paid by CBS in that year over 7,500 programs, its cost for ASCAP or BMI music runs about \$1,000. per program. Of course, as detailed later, many of CBS' programs, such as news and public affairs shows, use no music at all; while others, such as variety shows, use a great deal. \$1,000. is a small fraction of the total cost of the program. CBS pays about \$200,000. for each episode of a one hour variety show or dramatic serial, and as much as \$750,000. for a made-for-TV movie. Since the commencement of this action, CBS has held interim blanket licenses from ASCAP and BMI at a total annual cost of some \$6 million.

B. The Consent Decrees

Neither ASCAP nor BMI is a stranger to antitrust litigation. In 1941 the government sued ASCAP for antitrust violations. The action resulted in a consent decree which largely governs ASCAP's relationships with licensees such as CBS and other users. As amended in 1950, the decree requires ASCAP to offer a "per program" license to broadcasters in addition to the blanket license it has traditionally offered. Both forms of license grant the right to use any or all of the works in ASCAP's repertory. However, the blanket license allows use of the entire in-

ventory for a designated period of time, usually a year, for which the user pays a flat fee, while the per program license permits use of the entire repertory but requires payment only with respect to programs which actually make use of copyrighted music. The 1950 decree mandatorily enjoins ASCAP to set its fees for these licenses in a manner which gives the user a genuine choice between them, and prohibits it from requiring or influencing the prospective licensee to negotiate for a blanket license before negotiating for a per program license.[3] If ASCAP and the licensee

---

3. The 1950 decree states in part that ASCAP is:

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs,

(footnote continued on next page)

are unable to agree on a fee, the latter may apply to the United States District Court for the Southern District of New York for determination of a "reasonable fee." In such proceedings, ASCAP bears the burden of establishing the reasonableness of the fee it requests.

Finally, ASCAP's licensing authority is not exclusive. The 1950 decree provides that music users may bypass

---

with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding . . .

ASCAP entirely, and negotiate for a license directly with the composer or publisher holding the copyright.[4]

Under the terms of a consent decree entered in 1966 in *United States* v. *BMI* (S.D.N.Y.), BMI is required to offer a per-program license in addition to a blanket license. The difference in the terms of these licenses must be justified by "applicable business factors."[5] Although the form of the BMI decree differs from that of the ASCAP decree,

---

4. The Decree provides:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user nonexclusive licenses for rights of public performance;

5. The BMI consent decree provides in part:

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3) in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

the parties have stipulated that CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members. (CX 3)

C. CBS' Complaint

CBS does not allege that ASCAP and BMI have violated the terms of the consent decrees. It claims, rather, that the licensing alternatives which the decrees specify are not flexible enough to meet its needs, and are not realistically available to it. Thus, CBS' complaint charges that the blanket license "compels" it to pay performance royalties with respect to television programs which use no music and that the per-program license requires it to pay the same royalty for a program which uses a single copyrighted composition as for one which uses many. (Complaint ¶¶14, 19). In other words, CBS asserts that defendants are "using the leverage inherent in [their] copyright pool to insist that plaintiff pay royalties on a basis which does not bear any relationship to the amount of music performed." (Complaint ¶19) As to the third alternative specified in the consent decrees—the possibility of bypassing ASCAP and BMI entirely and seeking licenses for the specific compositions it wishes to perform directly from the copyright proprietors—CBS alleges that any attempt by it "to acquire such a large body of rights from the [individual copyright proprietors] . . . would be wholly impracticable . . ." (¶15)

CBS' disenchantment with the blanket licensing system takes form in several legal claims: first, that the writer and publisher members of ASCAP and BMI have combined

through their common licensing organizations to eliminate price competition among themselves and, by pooling the grant of their respective licenses through ASCAP and BMI, to fix the price which a television network must pay to secure the rights; second, that ASCAP and BMI insist on granting only blanket licenses and have therefore imposed an unlawful tie-in, in that CBS is required to purchase the rights to music it does not want to buy in order to secure the rights to music it does want; third, that by forming pools of music and requiring CBS to deal with the common licensing agent of the pools, the writer and publisher members and affiliates of ASCAP and BMI are engaging in a concerted refusal to deal directly with CBS; fourth, that through ASCAP and BMI the writers and publishers are guilty of monopolization, both attempted and achieved; and fifth, that the activities described constitute copyright misuse.

Despite this rather imposing line-up of charges, the central issue in the case is not complex. The essence of CBS' claim is that ASCAP and BMI are illegal combinations whose purpose and effect is to exact royalties from CBS for music it does not wish to license. The validity of the claim turns on whether CBS is in fact compelled to take a blanket license from the licensing organizations in order to secure the performance rights it needs. ASCAP and BMI contend that CBS is not compelled to do so, but has, in common with the ABC and NBC television networks and virtually all radio broadcasters, found it most convenient to license music by the blanket method. Defendants argue that if CBS no longer wishes to secure performance rights

through centralized agents such as ASCAP and BMI, it can obtain the necessary rights directly from the individual members and affiliates of ASCAP and BMI by negotiating with them for performance rights to the particular compositions it wants. As defendants view the case, if CBS is to prevail it must prove that direct licensing with members of the alleged combination is an unfeasible alternative to the blanket license. Proof that licenses could not be obtained directly from copyright proprietors, despite the fact that ASCAP and BMI are required by consent decrees to permit their members and affiliates to license their compositions to users directly, would support the inference that defendants have formed illegal combinations in order to foreclose competition in the market for performance rights to music for network use. Conversely, proof that direct licensing is a feasible alternative method by which CBS could satisfy its music needs would undercut its claims that copyright proprietors have combined to monopolize the market for performance rights and have used their leverage to fix prices and impose unlawful tie-ins.

CBS vigorously disagrees with this view of the case. It argues, as though it could have moved for summary judgment years ago, that ASCAP and BMI are guilty of per se violations of the antitrust laws because the blanket licensing system, which is the only method by which CBS and the other networks have ever licensed performance rights, has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) CBS views the question of the feasibility of direct licensing as irrelevant to the issue

whether defendants have restrained trade. It argues that the sole questions to be determined are (1) whether defendants' restraint is justified or reasonable in view of the unique economic setting of the music licensing market; and (2) whether licensing can be accomplished on a more competitive basis. We find CBS' analysis unpersuasive. Nevertheless, we set forth our views on the questions CBS raises because of their central importance to the case. To do this, we must retrace some of the steps taken to define the issues prior to the trial.

II.

The Issue Presented for Decision

A. ASCAP's Motion for Summary Judgment

At an earlier stage in the litigation ASCAP moved for summary judgment, relying principally on the decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). In *K-91* several members of ASCAP sued a radio broadcaster for infringement. The broadcaster admitted the infringement but defended on grounds similar to those asserted by CBS: that ASCAP is an unlawful combination engaged in price-fixing and block-booking of its members' compositions. In rejecting the claims, the Ninth Circuit observed that ASCAP does not fix prices because, under the 1950 consent decree, the United States District Court for the Southern District of New York is the ultimate price-fixing authority in the event of disagreement as to the reasonableness of ASCAP's fees. As to the other claims, the court observed:

> "No contention is made here that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.
>
> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved [by the 1950 decree]." 372 F.2d at 4.

Although we agreed with the *K-91* court, and continue to agree, that the activities of ASCAP and BMI are not illegal per se, we denied ASCAP's motion for summary judgment because of a critical difference between the case presented in *K-91* and the one at hand. In *K-91* the parties stipulated that it would be virtually impossible for broadcasters and copyright proprietors to arrange separate licenses and payments for each radio performance of a copyrighted composition,[6] and no proposal was made to the court of a prac-

6. The United States adopted this position in its Memorandum of Amicus Curiae submitted in connection with the petition for writ of certiorari to the Supreme Court of the United States in *K-91*:

> . . . There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann.Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to

(footnote continued on next page)

ticable alternative to blanket and per-program licenses. In contrast to *K-91*, CBS' claims are premised on the practicability of alternatives to the system now in effect. As noted earlier, CBS seeks an injunction either enjoining ASCAP and BMI even from offering blanket licenses or, in the alternative, and preferably, establishing what CBS calls a "per-use" system, by which ASCAP and BMI (rather than individual copyright owners) would be required to license individual compositions in accordance with a schedule of fees under court supervision.[7] Moreover, far

exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished. (Memorandum at 9-10)

7. Under the "per-use" system proposed by CBS, it would continue to license its music through ASCAP and BMI, but in a substantially different way than it does under the blanket license. CBS would pay ASCAP or BMI a specified fee for each performance of a composition in the pool (the "per-use reservoir"), plus an administrative fee. The fee for each use would be fixed in a schedule reflecting the nature of the use (theme, background or feature use) and other appropriate factors such as duration of use, or the popularity of the composition. Thus, the fee schedule would likely provide different prices for otherwise comparable uses of particular compositions. If the fee schedule could not be fixed by agreement between CBS and defendants, it would be set by the court.

Each copyright proprietor would have the right to "withdraw" any of his works from the per-use reservoir on reasonable notice or at periodic intervals (e. g. quarterly). However, the right of withdrawal would not extend to spontaneous or other unplanned uses, nor to music which was filmed or taped prior to withdrawal even though the performance occurred after withdrawal. CBS and its producers would remain free to negotiate a license for a composition directly from the copyright proprietor regardless whether it is in the reservoir or has been withdrawn. The per-use rate schedule would be adjusted at periodic intervals to reflect prices negotiated in direct licensing transactions.

from being a stipulated fact, the impracticability of CBS' "bypassing" ASCAP and BMI to secure licenses directly from copyright proprietors is the key factual issue in the case. Accordingly, we held that the feasibility of less restrictive alternatives to the blanket licensing system presented a genuine issue as to a material fact in the case and denied summary judgment to ASCAP.

Subsequent to determination of ASCAP's motion and in accordance with our holding, we ordered trial of the following specified issues:

"(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;

(ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

B. CBS' "Per Se" Contention

Despite our earlier holding that the activities of ASCAP and BMI are to be judged by the rule of reason and the specification of the issues to be tried in light of that holding, CBS now takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis. As noted earlier, it argues as to the first issue, that it has established an illegal restraint of trade as a matter of law because the blanket licensing arrangement has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) Coming after an eight week trial and the accumulation of

a bulky factual record, the timing of this contention is unusual. For the reasons stated below, we find it to be unmeritorious as well.

In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ("sellers") of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular "products" (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.

The claim fails as a matter of law. In *Automatic Radio Co., Inc.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), the parties entered into an agreement by which Automatic Radio acquired a license for a ten year term to incorporate into its products any or all of several hundred patents held by Hazeltine. Automatic Radio was not obligated to use any of the patents in the manufacture of its products, but agreed in any event to pay Hazeltine royalties based on a percentage of its total sales.

Automatic argued that the terms of the license constituted per se patent misuse and an illegal tying arrangement because the agreement exacted payment of a royalty on all sales whether or not its products used the patents, and in effect required it to purchase licenses for products for which it needed no license as well as for those which did. In rejecting the argument, the Court stated:

> "We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable. Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. We are not unmindful that convenience cannot justify an extension of the monoploy [*sic*] of the patent. But as we have already indicated, there is in this royalty provision no inherent extension of the monopoly of the patent. Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents plus any developments resulting from respondent's continuous research. We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." 339 U.S. at 834, 70 S.Ct. at 898 (citations omitted).

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) the Court

refined the standards by which the validity of package licenses are to be judged. At issue in that case was the propriety of an injunction entered by the district court enjoining Hazeltine from:

> "A. Conditioning directly or indirectly the grant of a license to . . . [Zenith] . . . under any domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" 395 U.S. at 133-34, 89 S.Ct. at 1582 (emphasis in original).

The quoted provision was directed at Hazeltine's proven policy of *insisting* upon acceptance of its standard five-year package license agreement covering some 500 patents, and reserving royalties based on Zenith's total radio and television sales whether or not the licensed patents were actually used in the products manufactured. The Court of Appeals had stricken the last clause of the quoted paragraph, relying on *Automatic Radio* for the proposition that conditioning the license upon payment of royalties on unpatented products was not misuse of the patent. The Supreme Court disapproved this construction of its earlier decision. It distinguished between the situation presented in *Automatic Radio,* in which the parties *agreed* on a package license "as a convenient method designed by the parties to avoid determining whether each radio receiver embodied [a Hazeltine] patent," and the situation in *Zenith,* where the patent holder *compelled* the licensee to choose between a package license conditioned on the payment of royalties on unpatented products, or no license at

all. 395 U.S. at 135-37, 89 S.Ct. 1562.[8] In other words, the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor.

We disagree with CBS that such compulsion inheres in the present licensing system as regulated by the consent decrees and that defendants are therefore guilty of per se violations. As noted earlier, CBS makes no claim that either ASCAP or BMI has violated any provision of the consent decrees. The terms of the decrees do not by any construction suggest that CBS is in fact compelled to take a blanket license. To the contrary, ASCAP and BMI are required to offer per program licenses under which a fee is charged only with respect to programs in which a composition within the repertory has been performed; and to structure the fees for blanket and per program licenses so that the user has a genuine choice between them. Apart from the licenses available from ASCAP and BMI the decrees leave a music user free to obtain licenses directly from copyright owners. This factor alone markedly distinguishes the present case from *Zenith,* in which Hazel-

8. The Court amplified the distinction as follows:

> If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them" he cannot complain that he must pay royalties if he chooses to use none of them . . . But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent . . .
>
> We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales . . . 395 U.S. at 139, 89 S.Ct. at 1585.

tine, as the sole supplier of the patents in issue, had, for all practical purposes, unlimited leverage in bargaining the terms of any license to them.

C. *CBS' Theory of the Burden of Proof*

Taking a different tack, CBS also argues that "it is clear that [ASCAP and BMI] insist on licensing exclusively on a blanket basis" and that because they insist on such an "inherently restrictive" method of sale, they have the burden of proving the availability in the market place of acceptable substitutes, i. e., that CBS could obtain direct licenses sufficient to meet its needs from copyright proprietors. (CBS Post-Trial Brief at 15, 26-27) Neither the facts nor the law support the argument. As outlined later in this opinion, the evidence does not establish that ASCAP and BMI insist or have ever insisted on licensing on a blanket basis; and, of course, if they did, they would flatly violate the terms of the consent decrees.

In any event, the argument fails as a matter of law. CBS cites a number of cases for the proposition that a defendant who argues that the plaintiff can avoid injury by obtaining a substitute product bears the burden of proving such an assertion. See, *TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, 462 F.2d 1256 (8th Cir. 1972); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 872, 27 L.Ed.2d 826 (1971); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied sub nom., Providence Fruit & Produce Bldg., Inc.* v. *Gamco, Inc.*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952); *Stanton* v. *Texaco, Inc.*, 289 F. Supp. 884 (D.R.I. 1968).

To secure injunctive relief in a private antitrust suit, the plaintiff must prove an actual violation of the antitrust laws or that such violation is impending and that as a result the plaintiff is threatened with loss or injury. *Zenith Radio Crop.* [*sic*] v. *Hazeltine Research, Inc., supra*, and *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 476 F.2d 989 (5th Cir. 1973). In the cases on which CBS relies, the plaintiff had indisputably established the first element, i.e., that the defendant had illegally denied him something he wished to purchase, for example, space in a fruit market, access to telephone poles for a cable TV installation, or an aircraft dealership. The defendant in those cases argued that the plaintiff had failed to establish the second element of its claim—injury or the threat of injury—because he had not proven that he could not avoid injury simply by purchasing a substitute product elsewhere in the market. The court in each case held that a plaintiff does not have the burden of proving the non-existence of suitable alternatives in order to prove injury or the threat of injury, particularly when it is clear that no substitute will have the unique attributes of the product which the defendant denied the plaintiff. However, in none of the cases did the court suggest that the plaintiff does not have the burden of proving the first element: the restraint of trade itself.

Accordingly, the validity of CBS' argument that it does not bear the burden of proving that direct licensing is not a feasible alternative to the blanket license turns on whether the issue of "alternatives" relates to the element of restraint, or the element of injury. We believe that it relates to the first factor: that is whether ASCAP and BMI have restrained trade. In the cases just discussed, plaintiff al-

leged that the defendant would not sell him something which he wanted to purchase, and the defendant argued that the plaintiff was not injured by the refusal because market substitutes were available. The present case poses an entirely different claim. The alleged restraint of trade is not that CBS is excluded from purchasing the services offered by ASCAP and BMI, and told to find substitutes elsewhere; but that (1) they allegedly offer only blanket licenses, which CBS says it does not want; (2) have combined to make any effort to obtain an alternative form of license (such as direct licensing) unfeasible; and (3) thereby compel CBS to continue to take a blanket license and to pay for music which it does not want to buy. Unlike the situations in the cases on which it relies, CBS *does not want the organizational defendant-seller's product at all.* Far from spurning "substitute" products, CBS claims that the lack of a substitute constitutes an alleged restraint of trade. So much is clear when one considers the nature of the direct licensing alternative. It is not at all a "substitute" in the sense used in the "injury-avoidance" cases; it is another means of licensing (on an individual basis) the use of precisely the same music which CBS would perform if it purchased a blanket license. If direct licensing is realistically available, it would enable CBS to pay only for the music it uses and for no other music, and would demonstrate that CBS' complaint in this action is unjustified.

In sum, we adhere to our earlier conclusion, as embodied in the pre-trial order, that to prevail here CBS must prove that defendants' conduct in combining into ASCAP and BMI *compels* CBS to take a blanket license as alleged in

the complaint. Proof that direct licensing is not a feasible alternative to the blanket license is an essential element of CBS' claim, on which it accordingly bears the burden of proof. Conversely, proof that CBS could obtain the necessary performance licenses directly from copyright proprietors would be fatal to its claim that they have pooled the rights to perform their music in a manner which illegally restrains trade in those rights. If the restraint is proven, only then do defendants have the burden of proving that the restraint is justified by the economic context in which music licensing for network television use takes place, and cannot be achieved by less anti-competitive means.

III.

The Stipulation as to Competitive Disadvantage

Prior to trial, the parties executed a stipulation which states in part:

> ". . . There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or such producers to negotiate for licenses directly with the owners of the performance rights of said music. [Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (CX 2, ¶13; bracketed portion in original.)
>
> "If [CBS] chose not to have an ASCAP license, the producers of [CBS] programs did not obtain such licenses, and [NBC] and [ABC] had such licenses, to

> the extent that [CBS] or the producers of [CBS] programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on [CBS] programming, [CBS] would be at a competitive disadvantage vis-a-vis [NBC] and [ABC].'"[9] (Id. ¶15)

CBS argues that, putting aside its proof at trial as to the impracticability of the direct licensing alternative, ASCAP and BMI have ceded the primary issue in the case by stipulating that CBS could not obtain direct licenses for all its music needs and that consequently, if it dropped its blanket license, it would be at a competitive disadvantage vis-a-vis networks which continued to hold such licenses.

We disagree with the contention that defendants have stipulated the case away. Paragraph 13 does not specify the "portion" of the compositions in the ASCAP repertory as to which it would be "impracticable" for CBS to license directly; and the extent of "impracticability" is critical to the feasibility of direct licensing. As detailed later in this opinion, the evidence establishes that musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable. Accordingly, even if CBS had access to far less than all of the compositions in the ASCAP and BMI repertories, that would not in itself render direct licensing unfeasible.

Because a fair reading of Paragraph 13 does not indicate that ASCAP and BMI have admitted the unfeasibility

9. BMI has stipulated with CBS that with respect to the practicability of CBS' obtaining direct licenses from BMI writers and publishers, BMI and CBS are bound by the determination in this case with respect to the practicability of CBS' obtaining direct licenses from ASCAP writers and publishers.

of direct licensing, Paragraph 15 loses the dispositive force which CBS attributes to it. It is obvious that CBS might be at a competitive disadvantage vis-a-vis other networks if it held no music license. But that fact only raises, but does not settle, the question of what licensing methods are available to CBS. We regard the stipulation merely as an aid to the definition of the issues of the case. The extent of CBS's use of music, the kinds of compositions it needs, and the persons with whom it must deal to negotiate licenses for them are factors whose relevance to the feasibility of direct licensing is only suggested by the stipulation, on which the parties reserved the right to offer proof. The decision in this case rests on the evidence as to those factors, not the stipulation itself. Accordingly, we turn to the question whether CBS is in fact "compelled" as alleged in the complaint.

IV.

Compulsion: The Quality of the Evidence

Defendants argue that CBS' case, which alleges the refusal of the defendants to license on terms which require CBS to pay only for the music it uses, falters at the threshold because CBS has not shown that it ever made a clear demand on defendants which they have rebuffed. It is true that several courts have imposed such a requirement in treble damage cases based on a conspiracy to deprive the plaintiff of a particular product. See, e.g., *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theaters, Inc.*, 268 F.2d 246, 251 (2d Cir.), *cert. denied*, 361 U.S. 885, 80 S.Ct. 156, 4 L.Ed.2d 121 (1959); *Webster Rose-*

wood Corp. v. *Schine Chain Theatres, Inc.*, 263 F.2d 533, 536 (2d Cir.), *cert. denied,* 360 U.S. 912, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied,* 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). However, the requirement has not be [*sic*] imposed in any case of which we are aware, when the relief sought is an injunction rather than damages. Cf. *Zenith Radio Corp.* v. *Hazeltine, supra; Credit Bureau Reports, Inc.* v. *Retail Credit Co., supra.*

Although we agree with CBS that it is not required as a condition to suit to have been unequivocally refused the kind of license it now seeks, defendants' argument highlights the unusual nature of CBS' claim and the kind of evidence on which it relies. CBS does not claim that it is compelled to take a blanket license because ASCAP and BMI, or individual copyright proprietors, have actually refused or threatened to refuse to negotiate with it for alternative methods of licensing. Instead, its position is that ASCAP and BMI *would* refuse to negotiate new forms of licenses whose fees are based on actual music use; and that individual copyright proprietors *would* refuse to deal with it on a direct licensing basis, or at least make it such a difficult proposition that CBS would be forced to resume its blanket license. Although proof of what might or might not occur under hypothetical circumstances in the future is customary when the plaintiff in a private antitrust action seeks to establish a threat of injury, CBS relies heavily on hypothetical proof in order to establish the existence of the restraint itself—the nonavailability of direct licensing.

The other side of the coin just described is that CBS has made no effort to obtain the kinds of licenses it now

complains defendants are unwilling to grant. Although the absence of such evidence does not establish that CBS is not compelled to take a blanket license, we nevertheless regard it as highly relevant to that issue.

V.

The Break-Up of an Amicable Marriage

Until the institution of the present suit CBS appears to have lived quite happily with the blanket arrangement which it now disavows. Since 1929 it has obtained ASCAP blanket licenses for its various broadcast operations, the earliest one purchased on behalf of a radio station; and when CBS and other broadcasters established BMI in 1939, they agreed to take blanket licenses. Since its establishment in 1946, the CBS television network (CTN) has continuously held blanket licenses from ASCAP and BMI. Since 1950, CBS' negotiations with ASCAP for licenses for its television network have of course been conducted within the framework of the amended consent decree. Although, as noted earlier, the terms of the 1950 decree prohibit ASCAP from negotiating a blanket license prior to determining whether the user would prefer a per-program license,[10] CBS has never applied for relief under the decree complaining that ASCAP insisted on blanket licenses. Nor has the court ever been required to set a "reasonable fee" for the blanket licenses negotiated by the parties from time to time. CBS has never negotiated or held a per-program license from ASCAP or BMI for its television network and has never attempted to fullfill its

10. See note 3, *supra.*

music requirements by bypassing either organization and securing performance rights directly from copyright owners.

This suit did not follow a breakdown in negotiations for a new form of license, but for a renewal of CBS' *blanket* license from BMI. In April, 1969, CBS and ASCAP submitted for court approval agreements providing for final license fees as adjusted for 1969 and several prior years. Because the payments provided for in the agreements would have had the effect of sharply widening the historical ratio between BMI and ASCAP fees from CBS, BMI's President, Edward Cramer, protested to Donald Sipes, CBS' Vice President in charge of business affairs for the network, that BMI would insist on maintaining parity with ASCAP. After several meetings between Sipes and Cramer in 1969 during which the latter was unable to negotiate higher fees, BMI gave notice on October 29, 1969 that it was exercising its right under the consent decree to terminate CBS' license, effective January 1, 1970.

CBS did not apply for relief under the decree. Instead, on December 19, 1969, more than a month and a half after BMI's notice of termination, and less than two weeks before termination would become effective, the President of the CBS television network, Robert D. Wood, wrote to ASCAP and BMI requesting each of them to "promptly submit to us the terms upon which you would be willing to grant a new performance rights license which will provide, effective January 1, 1970, for payments measured by the actual use of your music." This was the first such demand CBS had made. By letter dated December 23,

1969, Herman Finkelstein, ASCAP's general counsel, replied that ASCAP would consider the proposal at its next Board of Directors meeting on January 29, 1970; that it regarded CBS' letter as an application for a license in accordance with the consent decree; that CBS would in the meantime have an interim license for 60 days "at rates and terms to be negotiated, or determined ultimately by the court;" and that representatives of ASCAP would meet with CBS counsel on January 12, 1970 to discuss the application further. (PX 201)

By letter dated December 23, 1969 Cramer replied to CBS' request on behalf of BMI and stated that "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." (PX 202) CBS did not, however, pursue the matter further. Instead it commenced this lawsuit a week later, on December 31, 1969.

Neither the history of the relationship between the parties nor the events leading to this action remotely suggest that CBS has been compelled to take a blanket license it did not want. Indeed, CBS does not even appear to have seriously considered available alternatives to the blanket license prior to the commencement of suit. CBS' Vice President in charge of business affairs and planning for the network, Donald Sipes, was its principal witness as to the undesirability of blanket and per program licenses, and the need for a license under which the fee would be based strictly on actual use. Sipes testified that he first decided to explore alternatives to the blanket license sometime in 1968 or 1969. Although he was almost completely

unacquainted with the intricacies of music licensing, he spoke to only three people in the course of his exploration. Two of these, Robert Evans and John Appel were house counsel for CBS. Sipes spoke to them only in their capacity as counsel, and did not seek their advice on the business aspects of licensing. The third person Sipes consulted was Emil Poklitar, the CBS employee in charge of the clerical personnel who process music logs and case sheets submitted by program producers to be sure the necessary rights have been cleared. Poklitar is not a business man and his duties involve a narrow portion of the music licensing spectrum.

Despite Sipes' lack of expertise, neither he nor his colleagues at CBS consulted any music writers, publishers, television producers or any other expert in the field about possible alternatives to the blanket license. (Tr. 151, 204, 358, 371) No one at CBS ever conducted a feasibility study about presently available or proposed methods of licensing the music to be performed on its television network. (Tr. 156-57) Indeed, Sipes testified that he did not even speak to other CBS executives about alternatives to the blanket license; he considered the alternatives entirely on his own initiative. (Tr. 180, 369) In sum, CBS thought very little indeed about revising its licensing practices prior to Robert Wood's "demand" letter to ASCAP and BMI just prior to the commencement of this suit. The evidence described hardly supports CBS' contention that it has been compelled to take a blanket license. To the contrary, it suggests that CBS did not even view music licensing as a business problem until immediately prior to suit.

VI.

The Claim That the Structure of the Market Bars Direct Licensing

In the absence of direct evidence that ASCAP and BMI and their members and affiliates have refused to negotiate licenses which reflect actual music use, CBS' claim that it is compelled to take a blanket license hinges on proof that the direct licensing alternative which exists in theory under the consent decrees is not a viable method for securing the necessary performance rights.

CBS claims that it established at trial that the defendants have structured the market in such a way as to lock it into a blanket licensing arrangement and to make any attempt to license its music needs directly so prohibitively risky as to preclude it even from trying. The basic elements of this claim are illustrated by the following syllogism: First, it would be uneconomic for CBS to attempt direct dealing while it still holds a blanket license, because it would then be paying twice for the same music: that is, since the blanket license fee covers unlimited use of the ASCAP or BMI repertory, direct licensing transactions would involve the purchase of additional licenses for music already covered under the blanket arrangement. Second, because copyright proprietors and television networks have never engaged in direct dealing, the transactional machinery necessary to negotiate and clear direct licenses between CBS program producers and the large number of individual copyright proprietors has not been developed; and the absence of such machinery creates a "barrier" to direct licensing. Third, because the blanket license system

insulates copyright proprietors from price competition among themselves, they have no incentive to create the necessary machinery, and indeed would refuse to deal with CBS if it attempted to license its needs directly. Fourth, the risk of a refusal to deal is particularly acute in relation to CBS' present inventory of programs and films, which contains a large number of performances of copyrighted music whose initial runs on television were licensed under a blanket license. If CBS dropped its blanket license, it would need to seek direct licenses for the music contained in any programs which it plans to rerun because a rerun constitutes a performance for profit. Accordingly, the CBS inventory would be vulnerable to "hold-ups" by copyright proprietors who could either refuse to license their music at all, or exact a premium price for it.

In sum, CBS claims to have established that because there is at present (1) no market machinery for direct dealing; (2) no expectation that it will be created; and (3) reason to believe that proprietors would refuse to deal with CBS, particularly with regard to programs in its existing inventory which it wishes to rerun, direct licensing is not a feasible alternative and defendants illegally compel CBS to continue to take a blanket license. To understand the evidence relating to these claims, it is necessary first to describe the nature and extent of CBS' use of music.

VII.

CBS' Use of Music

Music is used on network television in three principal ways: as theme, background or feature music. Theme music is the music used to introduce and close a program.

Background music is used to complement action on the screen. Feature music is music used as "the main focus of audience attention" (PX 469); for example, a performer singing a song on a variety show. Occasionally, however, well-known compositions suitable for feature use may be used as background music, for example, "Tea for Two" as background to a tea party scene. CBS concedes that it would be a simple matter for it to obtain direct licenses for most of the theme and background music it uses, and that the key to the feasibility of the direct licensing method is whether it can obtain licenses for the feature music and some of the background music it needs. To understand why this is so, some familiarity with the manner in which television programs are produced is necessary.

As noted earlier, CBS itself produces virtually none of its "entertainment" programming. Apart from the news, public affairs, sports and special events programs—which CBS does produce and which make little use of music—the bulk of the programs broadcast over the network are acquired from independent program production companies, or "packagers." Some of the packagers are well-known Hollywood "majors," such as MGM, Universal and Paramount. Variety shows and some of the filmed serials are produced by smaller production companies, which are sometimes owned by the star of the show. For example, the "Mary Tyler Moore Show" is produced by MTM Company, Ms. Moore's own; and "The Carol Burnett Show" is produced by her husband's company.

Ordinarily, the music used on entertainment serials is almost exclusively theme and background music composed especially for the program. For example, after the pro-

gram has been filmed or taped, the producer typically hires a background composer to view the film, decide which action requires musical background, score the music and arrange and conduct the music scored. The producer pays the writer a fee for this work and acquires the copyright from him, as an "employee for hire." Theme music is created the same way, but the same music is of course used from week to week over the life of the series.

The producers of most of CBS' regular programs own publishing subsidiaries which acquire the copyrights for the music which has been specially composed for the program. For example, CBS itself owns April Music, which in turn owns the rights to the background music used in "Gunsmoke." The producer of "The Carol Burnett Show" owns Burngood Music and Jocar, which acquire the music specially created for that show such as background music for comedy sketches. Major studios, such as Universal, own major publishing houses, such as Leeds Music, which in turn own the rights to music created for Universal's television programs. The publishing subsidiaries receive royalty distributions from ASCAP or BMI for performance of music on the shows created by their parent company. The royalties are of course a small fraction of the amount the producer receives from CBS for the program package itself. CBS may pay upwards of $200,000. for a one hour episode of a dramatic serial; the publisher's performance royalties for that program may amount only to about $1,500.

This description of the process by which theme and background music is created makes clear that CBS can easily acquire performance rights for such music as part

of the same transaction by which it acquires the program itself. Because the program production company, or its publishing subsidiary controls the rights to music specially created for the program, CBS could license the right to perform that music at the same time and place as the overall right to televise the program.

In contrast to theme and background music, feature music is not usually composed especially for the program. Rather, it is music which has been previously composed, and is controlled by a publisher who is not connected with the program production company. Feature music, and theme and background music whose copyrights are controlled by an "outside" publisher, cannot of course be licensed as a part of the overall transaction by which CBS acquires the program. Instead, in order to obtain rights to such music, it would be necessary for CBS or the program producer to approach the publisher who owns the rights to the music in question. As noted earlier, it is the feasibility of obtaining the licenses to this "outside" music on which the viability of the direct licensing alternate substantially depends.

In order to establish how much of CBS' music needs would require "outside" direct licensing transactions (as opposed to "inside" transactions with the program producer or his publishing affiliate whose feasibility CBS generally concedes) both sides have introduced into evidence computer runs which they claim establish the extent of CBS' music use in the three basic categories. In general the computer runs and the testimony relating to music use verify what the average television viewer would assume. CBS' news and public affairs programs use vir-

tually no music; the staple situation comedy, crime and drama series use almost exclusively theme and background music specially composed for the program; and feature and background music controlled by outside publishers not connected with the program producer is used regularly on a small group of programs: variety shows and variety specials, sports shows (e. g., football halftime shows), late night talk shows, and the "Captain Kangaroo Show."

Although the parties are in agreement as to the general pattern of CBS' music use, they differ in their claims as to precisely how much music CBS uses in each category and how evenly its use of music is distributed over the program schedule.

We believe it fruitless and unnecessary to determine the question whether CBS or defendants have more accurately interpreted the data as to CBS' use of music. It is fruitless because, as both sides concede, the data of record do not permit complete analysis. It is unnecessary because the validity of the conclusions which the parties seek to draw does not at all hinge on the few percentage points which separate the parties. Thus, defendants argue that the available data show that some 85-90% of CBS' programs used only "inside" music which could be conveniently licensed through the program packager, or no music at all; and that the music for another 5% of the programs could be licensed by seeking performance rights from only one "outside" publisher. According to defendants, only 3-4% of CBS' schedule is made up of programs (such as variety shows) which make heavy use of outside music, requiring licenses from several outside publishers. Accordingly, defendants argue, CBS could acquire

the necessary performance rights for nearly all of its programming without the creation of the "machinery" which CBS claims (as discussed below) is required to facilitate transactions between producers and publishers. This assertion is not inconsistent with CBS' argument that, even adopting defendants' figures, direct licensing for the few programs which do make heavy use of "outside" music would be impracticable in the absence of "machinery" to service the large number of transactions which would be required. In short, no matter whose figures are closer to the truth, the question would remain whether the lack of "machinery" destroys the feasibility of direct licensing as an alternative to the blanket license and constitutes an illegal restraint of trade.

VIII.

Are There "Mechanical" Obstacles to Direct Licensing?

A. The Legal Significance of "Machinery"

Prior to trial the parties stipulated that ASCAP members and BMI affiliates "have not established facilities or procedures" for processing requests by music users for direct licenses for performance rights. (CX 2, CX 3) CBS argues that the fact that the individual defendants have not established such "machinery" constitutes a "barrier" to direct licensing which compels it to take a blanket license. (CBS Post-Trial Reply Brief at 29) Putting aside the question of the kind of machinery CBS claims to be necessary and whether its absence does in fact make direct licensing of outside music unfeasible, we disagree with

CBS that defendants' mere failure to have created machinery amounts, without more, to an illegal refusal to deal. (CBS Post-Trial Reply Brief at 27)

As outlined above, CBS has not, in the many years it has held blanket licenses, indicated a wish to fill its music needs by means of direct licensing. There is no evidence of substance that before bringing this suit it ever considered such an alternative in its own business planning. The only expression of its dissatisfaction with the blanket system was the "demand" letter sent by the network President, Robert Wood, two weeks before the commencement of this suit. That letter did not even refer to direct licensing, nor of course to obstacles, such as the lack of "machinery," which arguably prevented CBS from engaging in direct dealing with copyright proprietors. Rather, the letter related only to CBS' request for alternative methods of licensing *through ASCAP* and *BMI*. In short, there is no evidence that CBS gave any thought to the need for machinery, or noticed its absence, prior to this litigation.

It is simplistic, in view of these facts, to argue that "by virtue of [defendants'] preemption of the field, there are absolutely no facilities in existence for . . . direct licensing . . ." (CBS Proposed Findings at 37). The "field" consists of buyers as well as sellers, and by taking a blanket license for twenty years, CBS (as well as other broadcasters) has "preempted" any need for the machinery whose absence is now claimed to constitute an antitrust violation. We are unable to accept the proposition that defendants have had the obligation to create the framework for a direct licensing system, particularly in the absence of any indica-

tion that CBS would ever wish to use it. There is no evidence, and indeed CBS does not claim, that defendants have refrained from creating the necessary machinery for the purpose of injuring CBS. In these circumstances, the fact that defendants have so far done nothing to facilitate direct licensing does not support the conclusion that they are illegally restraining it.

B. Problems Allegedly Created by the Lack of "Machinery"

Putting aside the question whether the mere absence of machinery illegally restrains trade in the market for performance rights, CBS has failed to prove that there are substantial mechanical obstacles to direct licensing. CBS postulates that under its new proposed licensing system it would pass on the job of licensing "outside" music to the production companies. In such a case, inside music would be conveniently licensed through the program packager and its publishing subsidiary. However, the producer would take on the additional job of obtaining rights to the outside music to be used on the program by contacting the publishers in question (or their agents, as described below) and dealing for the performance rights.

CBS' principal witnesses as to the need for machinery were Robert Wright, associate producer of "The Carol Burnett Show," and Edward Vincent, a former staff member of several network programs. Wright and Vincent are in the position of those who would use whatever machinery is required for direct licensing. In general the testimony of these witnesses was not persuasive, and their views on

machinery were vague and abstract.[11] (e. g., Tr. 482-83, 500, 687) Three basic claims emerge from their testimony. First, CBS asserts that the producer in a direct licensing world would sometimes have difficulty in identifying the publisher of a given composition in order to approach him for a license. The argument is based on the fact of life in the industry that publishers' catalogs shift as they buy and sell copyrights, so that the publisher listed on the sheet music or record label may no longer own the composition when the producer wants to license it. CBS further claims that even assuming the producer can locate the publisher, the negotiations will be beset by confusion because, as defendants concede, music publishers have no established procedures for dealing with requests for performance licenses. Accordingly, the argument goes, direct licensing would be impracticable until settled ways of negotiating licenses are developed and publishers train their staffs to handle licensing. Finally, even assuming the producer can speak to the publisher in a language he can understand, CBS claims that difficulty would be caused by provision in certain contracts between writers and publishers requiring that the writer's consent be obtained prior to the grant

11. We note in passing that most of the testimony of Wright and Vincent as to the need for "machinery" related to the peculiar needs of producers of CBS' few variety shows, which make unusually heavy use of outside music and are produced on short production schedules. CBS did not offer proof as to how the needs of variety show producers for "machinery" differ from the needs of producers of programs which use outside music less regularly and in more modest amounts, and in which speed is not of the essence in the licensing transaction. Accordingly, even if we found the testimony of Wright and Vincent to be more persuasive than we do, it would be of limited value to establish the extent of the "machinery" necessary for shows other than variety shows.

of a direct license by the publisher. A provision requiring such consent appears in the form contract of the American Guild of Authors and Composers (AGAC). CBS claims that ASCAP's computer runs of CBS' music use show that some 40% of the outside music it uses is written by AGAC composers, a figure we adopt arguendo; and that the need to obtain writer consents for the use of that music would delay direct licensing transactions and disrupt the tight production schedules under which some programs are produced, particularly variety shows.

For the reasons stated below, we find that CBS' claims as to the effect of lack of machinery are without merit. There are two basic flaws in CBS' general approach. First, CBS' premise that it would abruptly cancel its blanket license and seek to fulfill all its music needs by direct licensing on the next day (see, e. g., Tr. 463, 633, 1874, 1912-13) is utterly unrealistic. If CBS took such a course there might well be problems of the kind just described. But this would not be proof that defendants have created obstacles which render direct licensing unfeasible. As noted earlier, nothing in the antitrust laws requires defendants to maintain well-oiled machinery for direct licensing for the benefit of CBS. Indeed, there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation. Accordingly, to presuppose, as CBS does, that the feasibility of the direct licensing alternative is to be judged literally as of "tomorrow" miscasts the issue. The proper question, we believe, is whether such mechanical obstacles as exist could be

remedied within a reasonable period prior to cancellation of the blanket license.

The second flaw in CBS' approach is that it postulates that new direct licensing machinery would of necessity be an edifice entirely distinct from the machinery which now exists for the purpose of licensing other kinds of rights in music, in which ASCAP and BMI do not deal. As outlined earlier, the program packager is responsible for obtaining all rights necessary to televise the program except performance rights, which CBS obtains from ASCAP and BMI. These rights include "synch" rights, that is, the rights required for any program which is to be rerun. Program producers now obtain "direct" licenses for synch rights from publishers through "machinery" created for that purpose. Similarly, movie producers obtain from publishers the rights to record and perform the music they use, (i. e., "mechanical rights" or "mechanicals") and there is "machinery" for this purpose as well.

Thus, although CBS is literally correct that "there are absolutely no facilities in existence for the direct licensing of [performance] rights by music publishers or other proprietors" (CBS Proposed Findings at 37), it overstates the issue to assume that such facilities would have to be created "from scratch" (CBS Post-Trial Brief at 40). The narrow question in the first instance is whether, as ASCAP and BMI contend, the machinery which publishers and producers now use to license other kinds of music could be adapted to facilitate the licensing of performance rights as well.

C. A Look at Other Kinds of Machinery

Apart from television performance rights, other rights in copyrighted music include motion picture synchronization and performance rights, and television synchronization rights. While ASCAP and BMI do not deal in these rights, facilities to license these rights directly from copyright owner to user do exist.

The television synchronization right is the right to record copyrighted music on the soundtrack of a filmed or taped program. Such rights are required for programs which are to be rerun, as distinguished from those (such as sports events or certain "one-run" taped programs) which are regarded as "live" performances. The grant of TV "synch" rights is almost exclusively brokered through the facilities of the Harry Fox Agency, Inc., which represents virtually every major publisher, about 3,500 in all. As outlined by Fox's Managing Director, Albert Berman, and by Robert Wright and Edward Vincent, who are members of producers' staffs, the typical "synch" rights transaction starts with a telephone call to Fox from the producer or from Bernard Brody or Mary Williams, synch rights agents located in Los Angeles who represent producers in their dealings with Fox. Because Fox has instructions regarding each publisher's fee structure, (or, more often, is familiar with it on the basis of past experience) it is usually able to quote prices over the telephone for the compositions which interest the producer. The entire transaction, including actual issuance of the license, is completed within two to three days at most. Fox issues several thousand television

synchronization licenses annually, using a basic staff of only two employees.

A "movie rights" transaction consists of the licensing of the performance right *and* synch right in one package for use in a theatrical (as distinguished from television) motion picture. The versatile Fox Agency also represents publishers in the licensing of these rights. The negotiation is similar in form to the TV "synch" rights. As described by Marion Mingle, the Fox employee who handles movie rights, producers call or write to Fox requesting price quotations on a number of compositions. Mingle or her assistant then telephones the publisher and outlines the nature of the film and the kind of use which is to be made of the composition in question, so that he can quote the price for the right. Generally, the producer either accepts or rejects the various quotations on the spot; sometimes, however, he may make a counter-offer which Mingle passes on to the producer. In general, Mingle can quote prices to the producer within two days. She and her assistant license several hundred movies each year.

D. *Could Other Kinds of Machinery Help CBS?*

As note [*sic*] earlier, CBS claims that the non-existence of direct licensing machinery in the television performance rights field would practically bar direct dealing in several critical aspects: the producer would have difficulty in identifying the copyright owner of a song which had been sold to another publisher; the AGAC writer-consent requirement would delay the licensing transaction and disrupt production schedules; and publishers would be unable to

handle requests for licenses because they have no staffs or procedures for direct dealing in performance rights and have not created a central facility such as the Fox Agency to facilitate contact between producers and publishers. These claims dissolve in view of the evidence as to the licensing of other rights in music.

1. *Finding Copyright Proprietors*

In most cases the producer of a CBS show would have no difficulty identifying the "outside" publisher of a song for which he wants a performance license because he or his agent already deals directly with that publisher to obtain a synch license for the same song. As former CBS Vice President in charge of programming, Michael Dann noted, any program on tape or film is likely to be rerun, and program packagers usually obtain synch rights at the time the program is produced. Wright, who is on the staff of "The Carol Burnett Show," testified that problems in clearing synch rights are "rare." Edward Vincent, a former staff member of "The Jim Nabors Variety Hour," testified that the Bernard Brody Agency would have no difficulty in giving him the name and address of any copyright owner.

Even if lines of communication to obtain synch rights were not already established, there are several other ways in which a producer could identify the publisher of music he plans to use. Emil Poklitar, who works in CBS' music clearance department stated that CBS maintains a file containing the relevant information on over 100,000 compositions. Indeed, as Wright testified, publishers regularly

barrage television producers with catalogs and brochures to promote the use of their music. Where they have not done so, there appears to be no reason why CBS could not simply request the catalogs of the major publishers. Finally, it should be stressed that in the vast majority of cases, the copyright owner listed on the sheet music or phonograph record is still the owner of the composition in question.

2. *The AGAC Writer-Consent Requirement*

Nor has CBS proven that the writer consent requirement in the AGAC form contract would cause significant delay in direct negotiations for performance rights. At present, publishers are required to obtain an AGAC writer's consent for television synch licenses for songs over ten years old, and movie synch licenses for vocal use of a composition. (3M PX 31) Although Leon Brettler, Vice President of Shapiro, Bernstein & Co., a major publisher, testified that he has occasional difficulty contacting a writer who is on vacation or has just changed residence, the record establishes that meeting the consent requirement rarely causes delay in the issuance of a license. In addition to Brettler, several publisher witnesses were asked if they had trouble getting in touch with their writers. For example, Edwin H. Morris, who owns a company bearing his name, testified he has had no difficulties in doing so. Salvatore Chiantia, of MCA Music, testified that he is routinely able to locate his writers and obtain their consent. The reason why publishers have little difficulty in contacting a AGAC writer and obtaining his consent

promptly is not hard to fathom: writers are intensely eager to have their work performed on television. Many AGAC writers have simply given advance blanket consent to their publishers to avoid the risk that the producer will, because of time pressures, substitute a different song. As Chiantia stated in a letter to AGAC concerning consents for background uses (PX 84):

> ". . . if we are not able to give licenses to TV film producers at $25. per film, or if we have to obtain the written consent of each writer for each individual use, we would for all practical purposes never get the compositions from our catalogs into current TV films other than in a few rare instances. The writers who have given us their approval are aware of the competitive situation which exists in connection with the use of music in the filmed TV programs produced in Hollywood. It is because of that very reason that they gave us their okay to go ahead." (PX 84)

In the same vein, Louis Bernstein of Shapiro, Bernstein & Co. wrote AGAC:

> ". . . Please bear in mind that the authors and composers who come into our offices are desperately hungry for performances, which means money from ASCAP. A good number of writers have urged us to get them these performances and stop worrying about the AGAC technicalities. Even so, 19 out of 20 writers would gladly give us any authorization in writing, but since we are dealing with several thousand writers, it becomes a difficult job to be so technical." (PX 162)

There is every reason to believe that most writers would either give their publishers blanket consent for perform-

ance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights. As Chiantia testified:

> "It is no different than the situation with respect to synchronization rights. Why do you have any greater difficulty in this matter than you have in synchronization rights? There are certain synchronization rights that you need that I have to get my writer's permission on and you get them. Why suddenly do you have such a great problem in respect of getting performance licenses where you don't have that same problem in getting synchronization licenses." (Tr. 2970)

3. The Need For Centralized "Machinery"

Although CBS has failed to prove that producers seeking performance licenses could not identify copyright owners, or that the writer consent requirement would significantly delay direct licensing of performance rights, we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered. Without such machinery, direct licensing might be mechanically feasible, but would be a bulky and inefficient system: for a program producer (or an agent such as the Brody Agency) to contact each of the publishers whose compositions interest him, for every program, would of course be distinctly time-consuming and expensive.

In the past, the Fox Agency has responded to publishers' needs for central "direct-licensing" machinery for new kinds of music rights by expanding its long roster of services. Defendants argue, accordingly, that music

publishers would turn over the job of clearing television performance rights licensing to Fox as well. CBS replies that defendants oversimplify the problem of creating machinery because there can be no assurance that the Fox Agency will agree to take on the job of brokering performance rights. Of course, it is possible that Fox would refuse the opportunity to expand its business. But the lack of hard evidence on the point is chargeable to CBS, not defendants. Never having explored the feasibility of direct licensing, CBS has not given Fox any occasion to consider the possibility of brokering such licenses. In any event, there is no substantial basis for concluding that the Fox Agency would not expand its services to include television performance rights, just as it has expanded in the past to meet the need of publishers for a central agency for movie performance rights and television "synch" rights. However, even if Fox were unwilling to take on the job of brokering performance rights, the creation of a new agency modeled along the same lines need not be the imposing project CBS makes it out to be. Albert Berman, Fox's Managing Director, testified as follows:

> "Q Mr. Berman, you were asked by Mr. Hruska on direct something about suppose publishers ask you to take over licensing of public performances on network television. Do you remember that question?
>
> A Yes.
>
> Q And as I understood it, you said that you wanted to make a study before giving a detailed answer.
>
> A Yes.
>
> Q Let me ask this, sir: Would the task be significantly different from the task you now have when licensing TV sync [*sic*] rights?

> A Only in numbers. It is certainly much more formidable merely because the uses would be so much greater. But the job could be done, I assume, with enough people and enought [*sic*] physical equipment." (Tr. 973-74)

Berman did not testify, and CBS did not offer proof, as to how many people and how much physical equipment would be required. According to CBS' projections, which we adopt arguendo, the number of direct licensing transactions required each year from outside publishers would range from approximately four thousand to eight thousand. (The low figure is projected from a period in 1971 when CBS had three night-time musical variety series; the high figure is based on a period in 1970 when it had seven such programs. CBS does not make a projection for the season which began in the Fall of 1974, during which it offered only one variety serial, "The Carol Burnett Show.") The question is whether CBS' projection of some 4,000 to 8,000 transactions would entail a large number of complex tasks requiring a massive staff, or a simple task repeated four thousand times by a relatively modest one. CBS' post-trial submissions strain to give the impression that each time a producer wished to use a certain type of composition, Fox or its newly created equivalent in the performance rights field would have to contact several different publishers, who in turn would have to check whether the AGAC writers (if any) whose music is involved would give their consent to the grant of a license, and then begin active price negotiations for the song or songs in question. (CBS Post-Trial Brief at 37-44, Reply Brief at 39-40).

It is unrealistic to assume that such cumbersome procedures would be involved in a direct licensing world; indeed CBS' own papers offer the key to streamlining the job. As noted early in this opinion, CBS seeks as one form of relief in this suit the establishment, under court supervision, of what it calls a "per-use" system. Under the per-use system, as outlined by CBS,[12] musical compositions would continue to be licensed through ASCAP and BMI, but instead of taking a blanket license, CBS would license individual compositions, for which it would pay a specified fee for each use of music from the per-use "reservoir." The fee for each license would be fixed in a schedule reflecting the nature of the use (e. g., theme, feature or background) and other appropriate factors, such as duration of use. CBS suggests that one convenient way to set a fee schedule is to adopt the present formula by which ASCAP and BMI give royalty "credits" to their members and affiliates. (CBS Post-Trial Reply Brief at 71) The question which naturally arises, and CBS does not answer, is why publishers would not readily adopt the same concept of a fee schedule[13] under a direct licensing system,

---

12. The outline of CBS' "per-use" proposal are [*sic*] set forth at note 7, *supra*.

13. Instead of addressing itself to the feasibility of a fee schedule in a direct licensing world, CBS postulates that a central licensing agency for performance rights would require a "massive" staff because the negotiation of such rights would be more time-consuming and complex than the "cut-and-dried" negotiations which are the rule in the television "synch" rights field: setting a price for the former would involve factors such as the nature and duration of the use and the unique attributes of a particular song (e. g., "Happy Birthday"). The argument is without merit. It is true, as CBS points out, that in most cases television "synch" rights negotiations are fairly clean cut.

(footnote continued on next page)

in which case a centralized computer would store information as to prices as well as other necessary information for each publisher's catalog.

Of course, it is not for the court to propose a system for direct licensing. Nevertheless, on studious review of the record, we are left with the belief that careful planning would go far to remove any significant "mechanical" obstacles to direct licensing for performance rights. It is true, as CBS points out, that new personnel would have to be trained to handle the task. But the only evidence on the point indicates that new central machinery could be staffed primarily by clerical personnel, as it is at Fox. The period required to train such personnel is presumably measured in weeks or months, rather than years.

Such a finding is supported by CBS' own scenario as to how things would go in the event it prevailed in this suit: either of its proposed forms of relief—the establishment of its "per-use" system under ongoing court supervision; or a mandatory injunction against the issuance of blanket licenses to any network by ASCAP and BMI—would require the development of "machinery" at least as extensive and very much of the same pattern as that involved in

---

However, synch rights *and* performance rights for movies are negotiated in a single package; and accordingly the nature of the movie rights transaction provides a more relevant basis for determining CBS' argument that performance rights negotiations would be a complicated matter. As described by Marion Mingle, who handles movie rights at the Fox Agency, the increased complexity of the performance rights transaction amounts to asking the producer about the nature of the intended use and passing on the information to the publisher. (Tr. 870-71, 876-77) Mingle testified that she can generally supply quotations to producers within two days and, as noted earlier, she and a single assistant handle all of the several hundred movie rights licenses Fox issues each year.

a direct licensing system under the consent decrees. For example, if CBS won an injunction against the issuance of blanket licenses, it would of course be faced with the very same mechanical "barriers" to direct dealing of which it now complains so strenuously. Nevertheless, Donald Sipes, CBS' Vice President in charge of business affairs and planning for the network, freely conjectured that in such an event the lack of "machinery" would pose no problem because ABC-TV and NBC-TV would be "in the same boat":

> "A Under that assumption, all three networks are in the same boat. In other words, neither one of the three—that's bad English—but none of them have a competitive advantage, you see, over the others.
>
> Q Assuming that, then what?
>
> A Assuming that with a lot of struggle and some chaos up front, I think again that the machinery necessary to broker deals between the sellers and the buyers in this situation will spring up to fill that gap. There is a need, there is money to be made, and people will spring into that breach to fill that need and make it happen. And deals, direct deals will be made for musical compositions between buyers and sellers.
>
> Now, I do believe, of course, that it will take some time for that machinery to develop up front, but of course all three networks in that situation would have that same problem.
>
> Q Suppose, Mr. Sipes, the injunctive order, in other words the order prohibiting ASCAP and BMI from licensing television networks, the effective date of that order was deferred for a period of, let's say, a year. Would that remove the struggle you mentioned earlier in your answer? Would that solve that problem, in your mind?

A I think that during that time the machinery would develop, yes, sir." (Tr. 79-80)

As we view the matter, CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing. If CBS' Vice President in charge of the very subject at hand concedes that within one year suitable machinery would "spring up," no reason appears on this record why it could not in any event plan to change over to direct licensing, effective one year hence, without a court order to spur the effort.

CBS' sole response is that copyright proprietors would not of their own accord leave the safe haven of ASCAP and BMI and expend their resources to set up the machinery for direct dealing because they are afraid to engage in price competition for their works; and that only a court order could provide the "signal" that they must do so. The argument is unpersuasive. Assuming that copyright proprietors would in fact be willing to deal with CBS producers—a conclusion we reach in the next section—they would logically create an efficient mechanism to facilitate it (as they have in the case of other music rights), if only to hold down their own costs. In any event, the cost of creating new machinery would be passed on to music users, just as it is at present through ASCAP, BMI and the Fox Agency.

In sum, as stated earlier, CBS might well have "machinery" problems if it cancelled its blanket license "tomorrow." But this is not proof that defendants have created

"barriers" to direct licensing in order to compel CBS to take a blanket license; it is just as consistent with the fact, which the evidence establishes, that no one, including CBS, imagined that the blanket license would lose its charms until shortly before this suit. Because CBS does not claim that it would commence direct licensing tomorrow (although its counsel often questioned witnesses on the assumption that it would), the relevant question is whether the relatively modest machinery required could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could.

IX.

Would Copyright Owners Attempt to Thwart Direct Licensing?

A. The Nature of CBS' Proof

In the absence of proof that direct licensing is unfeasible because of mechanical obstacles CBS' case rests primarily on its claim that copyright proprietors would refuse to deal directly if CBS asked, or at least make it such an arduous and expensive proposition that CBS would be forced to resume the blanket arrangement. (CBS Post-Trial Reply Brief at 29) Indeed, in a substantial sense, the "disinclination issue," as it has come to be called in the course of the lawsuit, is the major factual issue in the case. As CBS' post-trial papers recognize, even questions such as mechanical feasibility hinge almost exclusively on the willingness or unwillingness of the defendants to smooth CBS' course or obstruct it, as the case may be. (See, e. g., CBS Proposed Findings at 45-47)

Such a claim is difficult to prove even in the best of cases, and the present suit is no exception. CBS' Vice President Donald Sipes testified that CBS has never sought a direct license. The three CBS witnesses who predicted that writers and publishers would refuse to deal with producers were Sipes, and producers Robert Wright and Edward Vincent. Their testimony on the point was unimpressive, particularly inasmuch as none of them had ever spoken to a publisher or a writer in relation to performance rights licensing. Vincent's direct testimony is representative:

> "Q Let's go back to the delays you said you anticipated getting a secretary on the telephone, et cetera. Don't you think that copyright proprietors are going to see to it that all those delays are removed in this world in which the CBS Television Network has cancelled its ASCAP-BMI licenses?
>
> A No, I don't believe that because I am assuming on the basis of this particular lawsuit, that ASCAP and BMI like things the way they are.
>
> If you are asking me to assume that they are going to have a parade for me if I tell them in front I am going to run an end run around their entire organization and attempt to deal direct and circumvent the ASCAP and BMI—
>
> The Court: I don't think that is the question Mr. Hruska asked you. I think he asked you whether you wouldn't expect the copyright owners to make quick arrangements to deal with you if CBS didn't have a—
>
> A No, sir, I don't, and that's the reason I don't. I don't believe that they would want to see that particular system succeed.

> The Court: Do you have any basis for saying that?
>
> The Witness: Well, as I began to state before, your Honor, there is a system under which they are operating now, which I assume for them is a very good system and that they like—" (Tr. 636-37)
>
> * * *
>
> "The Witness: Your Honor, it is my opinion that we are talking about members of a group, of a group that has banded together for a very specific reason, and they have sought the shelter of this group for good and reasonable reasons, again, I assume.
>
> You are also asking me if I think that I am going to expect them to want to deal with me?
>
> The Court: Yes, I am.
>
> The Witness: To come toward me and say, 'Yes, let's make a deal,' after I have circumvented their group.
>
> No, your Honor, I don't believe that prudent business sense dictates that I should believe that.
>
> The Court: I mean that's just on your general experience, you are saying that?
>
> The Witness: Yes, sir." (Tr. 639-40)

Despite the testimony of Sipes, Wright and Vincent that many if not most ASCAP members and BMI affiliates would be "disinclined" to deal directly with producers for performance rights, none of them could give the name of even one actual publisher or writer whom they thought would fall into that category. Sipes has never spoken to a copyright owner. (Tr. 204, 358). Wright, who is associated with "The Carol Burnett Show," was "confident" that ASCAP members would be reluctant to deal with him, but

was certain that Joe Hamilton, who wrote the theme music for the show would be inclined to deal (Tr. 489). Edward Vincent, of the Jim Nabors show, stated that the two writers with whom he had actually worked would deal with him (Tr. 726). CBS' economist Franklin Fisher, also expressed the view that ASCAP members would be reluctant to deal but, like Sipes, he has never spoken to a writer or publisher (Tr. 4853).

In the absence of evidence that any ASCAP member or BMI affiliate has ever refused or even threatened to refuse to grant CBS direct performance rights for any composition, CBS offered evidence as to (1) the strong economic incentives which would deter copyright proprietors from direct dealing (2) the experience of the Minnesota Mining and Manufacturing Company (the "3M" incident) in direct licensing its music needs for a background music tape and tape-player which it marketed in the mid-1960's and (3) the ease with which defendants could thwart a direct licensing attempt by CBS, by exacting premiums for the licensing of music already taped or filmed, (music "in the can") which has until now been covered by a blanket license.

B. The Alleged Incentives to Refuse to Deal

CBS' Post-Trial papers postulate the fact, which we adopt arguendo, that participants in the market for performance rights are rational businessmen motivated by the wish to maximize profits. It excuses its failure to pursue alternatives to the blanket license by arguing that "no reasonably prudent manager of a television network" would subject his company to the risks involved. (CBS

Proposed Findings at 33, 36) By a similar line of reasoning CBS contends that no prudent copyright proprietor would voluntarily relinquish the bargaining leverage and shield against price competition which ASCAP and BMI provide. According to CBS' theory of the case, these essentially hypothetical facts establish both the restraint (i. e., the unavailability of the direct licensing alternative) and the threat of loss (i. e., the economic risk involved in the attempt). We are skeptical of the validity of this general approach, for the issue is not what CBS or copyright proprietors perceive their respective risks to be, but whether CBS has established that its fear that copyright proprietors would in fact attempt to thwart a direct licensing attempt is justified. With that caveat, we turn to the relevant evidence.

It is true, as CBS relentlessly emphasizes, that most of the writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket licensing system. The preference is no surprise in view of the fact that the blanket license is the only way in which performance rights have been marketed to television networks for nearly thirty years. Moreover, the writer-publisher testimony establishes that, from their standpoint, the system is trouble-free and self-executing and the financial rewards are satisfactory. None of them expressed the wish to exchange their present, relatively uncomplicated way of doing business for what they viewed as a new mode involving unfamiliar procedures and possible financial uncertainty.

CBS stresses selected portions of the deposition testimony of several publisher witnesses who expressed them-

selves vigorously when asked to comment on such questions as the possible prohibition of the blanket licensing system. Several common themes pervade the portions of their testimony which CBS stresses: the recognition that there is a large number of publishers and writers who would be competing for exposure on the CBS network; that many of them might face financial difficulties as a result of possible intense competition in a very limited market; and the strong preference for licensing through ASCAP and BMI, which have a measure of bargaining clout in dealing with CBS, the world's largest "consumer" of music.

We may agree that the cited testimony proves that writers and publishers prefer the present system and are apprehensive of dealing directly with CBS. However, this by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis. Indeed, the snippets of testimony on which CBS relies are replete with the Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure. The colorful deposition testimony of Leon Brettler, an officer of Shapiro, Bernstein, Inc., is an example:

> "Q Do you think that there would be a good deal of price cutting by publishers in the licensing of performance rights to television networks?
>
> ". . .
>
> A In this case I haven't got the slightest hesitation of saying not that I know, but I am virtually positive there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.
>
> • • •

> "I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cutting and deals." (Dep. 295-98)
>
> • • •
>
> "I think that it would have substantial impact across the board, even to the big companies . . . the largest music publisher is still David compared to the Goliath of the television industry. The so-called top ten are still Davids compared to Goliath and the only time that I have ever heard of David whipping Goliath was in the Bible. Usually Goliath swamps David." (Dep. 302-03)

We do not view this testimony as aiding CBS' case. It tends rather to establish that copyright owners would line up at CBS' door if direct dealing were the only avenue to fame and fortune.

More significant, however, is the fact that, when read in their entirety, the depositions take on an entirely different hue. For example, Brettler testified that "there is no question of the fact that we would negotiate something" if a producer requested performance rights (Dep. 184-85), and that "hordes" of other publishers would do the same. (Dep. 304-05) Edwin H. Morris, who operates another publishing company, expressed anxiety similar to Brettler's. However, far from stating that he would not deal with CBS, he testified:

"Q Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?

A Yes.

Q Do you invite them to come into your office?

A I will even go to theirs." (Dep. 211-12)

The conclusion that CBS has failed to prove that the "disinclination" of writers and publishers to leave the blanket system would ripen into a refusal to deal directly is fortified by the trial testimony. Although most of the writers and publishers who testified expressed concern similar to those of CBS' deposition witnesses,[14] all but one of them testified that he or his company would negotiate directly with CBS for performance rights, and most of them believed that their attitudes were representative of others in their position. For example, Arnold Broido, President of the Theodore Presser Company, testified:

"Q * * *

"Let us suppose there came a time when CBS no longer held licenses from ASCAP and BMI and came to you to negotiate or seeking to negotiate direct licenses with you for public performance of compositions in your repertory.

What would be your reaction?

A We would deal with them, of course.

Q Would you tell us why?

A Well, there is really very little else that we could do. We would have no choice in the matter.

14. We note in passing that only one of the four deponents on whose testimony CBS relies in support of the "disinclination" issue was called by CBS to testify at trial.

We would regret it because, obviously, it would be an inconvenience to us and we would regret the breaking of the relationship but we would deal with them." (Tr. 3492-93).

Broido also stated that:

"the publishers would by and large talk with CBS or anyone else who came to them." (Tr. 3498)

Salvatore Chiantia, President of the Music Division of MCA, Inc., testified:

"My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to to make it work." (Tr. 2957)

"There are only three games in town. I have to play one of three games. If we are talking about television, there are only three games in town. If I am effectively cut out from one, I only have two more to play with." (Tr. 2947)

The response of the composers who testified was similar to that of the publisher witnesses. For example, the dean of American composers, Aaron Copland, expressed reluctance to change the blanket arrangement, but testified that he would engage in direct dealing if necessary:

"Q Now, it has been suggested in this lawsuit that in the event that the Columbia Broadcasting System Television Network for some reason or another no longer held a license from ASCAP and BMI it might come to you, as an individual copyright proprietor, as an individual composer, and seek a license from you

for the right to perform your copyrighted work or works.

I would like to ask you, sir, whether if someone from Columbia came to see you you would be inclined or disinclined to deal with them or what would your reaction be?

A Well, I think I would be rather regretful about the need to individually concern myself with the licensing of a particular work, since the present arrangement takes care of a great many of those chores, as I would think of them, and it seems a comfortable arrangement as it now exists, from our standpoint at any rate.

Q If, however, the question were squarely put to you, will you deal with CBS or will you refuse to deal with CBS, what would your answer be?

A Well, I think my answer would be that of most composers. If they want to get a performance, they will do what is necessary to get the performance and if they have to deal with CBS, they would, I suppose, agree to deal with them." (Tr. 3485-86)

Composer John Green testified to the same effect:

"Q Mr. Green, suppose the following hypothesis. That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you to write the background and theme music for the show.

Would you be inclined or disinclined to negotiate with him for the writing of that music?

A I would be inclined to negotiate with him.

Q Do you have an opinion as to whether other background writers and composers would be inclined

or disinclined to negotiate with CBS or its producers in that situation?

* * *

Q Do you have an opinion?

A I know how I would like to answer that question. I don't have an opinion but I would be surprised if they didn't feel exactly as I do.

* * *

Q Mr. Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?

A For the following reasons. I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

I like to hear it performed and I like to get paid for hearing it performed and you referred to [CBS]—would I be inclined to negotiate with [CBS] for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it.

Q Mr. Green, you have also told us that in addition to your work as a background composer you have written songs in your music career.

Suppose in that situation we posited just a moment ago, CBS canceling its ASCAP license, suppose one of your publishers called you up and told you that the producer of a CBS variety show is interested in using one of your compositions, one of your songs, on a show, and he asked you for your opinion or view, would you

be inclined to recommend that he license or negotiate with CBS or the producer or would you recommend that he not negotiate with CBS or its producer?

A I would recommend that he negotiate.

Q And why?

A Because I would want my song to be exposed and I would also want to derive the revenue that would come from such a source as [CBS] for that exposure." (Tr. 3457-60)

Perhaps it is not surprising that Walter Dean, who was called by CBS, was the only witness to testify that the publishers for whom he worked would probably refuse to grant licenses to CBS. The publishers are April and Blackwood, companies which CBS owns, and whose catalogs consist mostly of copyrights owned by CBS as well.

Although the testimony of the writer and publisher witnesses persuasively suggested that they would deal directly with CBS, at least *ex necessitate*, our conclusion that CBS has not proven that they would refuse to do so does not rest solely on their testimony. The extensive evidence on the nature of the music industry amply confirms the proposition.

The two most salient features of the television music market are the enormous value to copyright proprietors of network exposure and the markedly limited opportunities for securing it. Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music. To that end, publishers regularly direct extensive promotional efforts toward the networks, including the mailing of advance copies of sheet music or recordings to producers, performers and musical directors of television shows. Some publishers use promotional brochures or other written materials; others solicit by telephone. The record establishes beyond doubt that even in what CBS characterizes as a comfortable, blanket license world devoid of price competition, television network performances are highly sought by copyright owners.

The eagerness, and occasional desperation, of copyright proprietors is heightened by the fact that there are so few opportunities to win the prize. There are only three television networks and, as noted earlier, few programs which make appreciable use of previously published music; most programs either use no music at all or "inside" theme and background music published by the producer. The testimony of Alan Shulman, Vice President of the Belwin Mills Publishing Corp., aptly summarizes the situation:

"Q Are any of your promotional activities aimed at getting your music played on network television?

A Yes. But there are very, very limited number of opportunities to do this. For example, because of the number—well, they are limited pretty much to the variety shows that appear on the television networks and these are fewer in number of recent years than they were previously.

Q Why are your opportunities limited to the various shows?

A Well, because the other shows are basically prerecorded. Prefilmed, et cetera. The series, et cetera, are done and produced beforehand and the music that is performed and synchronized and used in those programs are pretty must [*sic*] controlled by the producers of the particular program.

And these producers, in fact, very often are publishers themselves who control the publishing rights and, naturally, are not too happy to use other people's music unless they absolutely have to because there is income from it." (Tr. 3083-84)

In fact, apart from variety programs, producers seldom "have to" use "other people's music." With rare exceptions, a considerable number of copyrighted songs are suitable for any use a producer might have in mind. Although every copyrighted composition is philosophically or aesthetically "unique" and its uniqueness is dignified by copyright, virtually none of the four million compositions in the ASCAP and BMI repertories is unique in the mind of a television producer. CBS' producer witnesses Wright and Vincent, testified that "any number" of songs would fit a producer's intended use and that "there would always be, obviously, alternates." (Tr. 419, 586) Copyright proprietors are keenly aware that their compositions are substantially interchangeable with the compositions of other writers and publishers, a factor which could well be expected to dissipate any "disinclination" to deal with CBS, which might othewise exist.

Moreover, CBS' enormous power within the music industry supports the testimony of the writers and publishers

who said they would engage in direct licensing. CBS is far more than a television network. It is, as Michael Dann, former Senior Vice President of CBS in charge of programming testified, "The No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music rights." (Tr. 3374) CBS is the largest manufacturer and seller of records and tapes in the world (Tr. 4615); it owns radio and television stations in a number of major metropolitan areas. On CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure. It would risk not only the loss of CBS performance royalties, but royalties from the sale of records sold by CBS subsidiaries and from radio plays of their records on fourteen radio stations operated by CBS in the seven largest cities in the nation.

Moreover, many of the largest publishers are, like April and Blackwood, subsidiaries of large entertainment companies. A number of the named defendants or their parent corporations are program packagers or movie distributors who compete to sell their products to CBS. For example, Famous Music is owned by Paramount and Leeds Music is owned by Universal. The royalties received by these publishing subsidiaries are a small fraction of the amount CBS pays for the program or film. It would be a rhetorical question to ask whether such producers would risk the sale of a program package to CBS because of the disinclination of its publishing subsidiary to engage in direct dealing for the music performance rights.

C. The "3M Incident"

In support of its disinclination theory, CBS also relies heavily on the experience of the Minnesota Mining and Manufacturing Company (3M) which sought direct licenses from publishers in connection with its marketing, in the mid-1960's of a tape and tape player (the M-700 project) designed to provide 24 hours of background music. The M-700 was designed for use in small commercial establishments, such as restaurants, stores, and doctors' and dentists' offices.[15] To this extent, the M-700 was similar to the packages offered by other vendors of background music services such as the well-known Muzak. In one important respect, however, it was different: 3M planned to sell its tape outright, while other vendors leased theirs for a limited term.

3M retained Allen Arrow, an attorney, to negotiate performance licenses for the M-700. Initially, Arrow approached ASCAP for licenses but during the ensuing discussions several problems arose. For example, ASCAP wanted, and 3M did not want, different rates for different classes of users. According to Arrow, ASCAP took the position that the consent decree, which prohibits it from discriminating between similarly situated licensees, barred it from offering a "one class" license because it would discriminate against vendors of background tape systems for larger establishments, such as Muzak and Seeburg. In addition, ASCAP found serious difficulty in 3M's proposal to sell its tape outright because ASCAP would be required,

15. We assume that the 3M project was not designed for the extensive play it has received in federal court.

after the expiration of an initial three year license term, either to try to relicense 3M's customers for a renewal term or, if they refused, to fight a losing battle trying to police possible infringement in a number of small establishments whose individual royalty payments would amount to some $10. per year. Although 3M, as a potential user, was entitled to invoke the licensing and rate-fixing procedures available to it under the consent decree, Arrow testified that 3M chose not to take that course because of time pressures in assembling the project and other such factors. In the circumstances, ASCAP suggested to 3M that it deal directly with copyright proprietors.[16]

There is considerable evidence that the publishers 3M approached viewed the M-700 proposal with some reservations. Some of them were concerned about the novel form of license 3M sought; others about the policing problem; others about the amount of money involved; and still others about the implications of such a proposal for the traditional ASCAP structure and their customary way of doing business. Nevertheless, 3M signed contracts with 27 of the 35 publishers it approached. It obtained all of the music it needed within its time schedule at a cost of about three quarters of the amount of its first offer to ASCAP.[17] Shortly thereafter, 3M began another success-

16. Because 3M was able to license its needs for BMI music from BMI, it did not seek licenses from its affiliates.

17. 3M's first offer to ASCAP was $27. per tape for three years (3M PX 2). ASCAP was asking between $21. and $30. per tape *per year*, or a total of $63. to $90. per tape for the initial license period (3M PX 7). For its direct licenses, 3M paid $21. per tape per year. Thus, it paid $6. less per tape than the amount of its first offer to ASCAP.

ful program to obtain licenses for a second series of M-700 tapes.

Although the statistics do not favor its case, CBS stresses the fact that 3M was able to reach agreement with "only" 27 of the 35 publishers it approached. It argues that a large music user like CBS could be expected to meet considerably greater resistance in a direct licensing effort than 3M, whose rather modest needs for direct licenses could not have threatened to topple the ASCAP structure. Defendants argue, on the other hand, that the 3M incident demonstrates that direct licensing is feasible. It points to the fact that, in the last analysis, 80% of the publishers 3M approached put aside whatever "disinclination" they might otherwise have had to direct dealing, and engaged in business negotiations over a business proposition.

We hesitate to give important weight to the 3M incident as evidence of the likelihood that copyright proprietors would attempt to frustrate CBS' efforts to engage in direct licensing. In the first place, 3M is hardly as large a music user as CBS. Moreover, it sought licenses for a highly fragmented group of small users, rather than for a huge television network. Finally, the form of license which 3M solicited, involving a package of compositions from a publisher for a three year term is not comparable to a license for one performance of a single composition before an audience of millions. In short, CBS and copyright proprietors would be trading for a very different horse than did 3M and the publishers which it approached. Moreover, the evidence as to the 3M incident was developed in large part through documents and deposition testimony; and included considerable hearsay in the testimony of Allen Arrow. We cannot give significant weight to arguments as to the state of mind (e. g., disinclination) of the publishers approached by 3M based on such evidence. Nevertheless, CBS has made the 3M incident a central part of its disinclination claim. For the reasons set forth below we find that the incident, if it proves anything at all, establishes that copyright proprietors would deal with CBS for direct licenses.

In our view, the bare fact that 8 of 35 publishers were unwilling to sign a contract with 3M has no legal significance; the only relevant question is why they did not. To the extent that the motivations of the unwilling publishers can be gleaned from this record, it appears that general opposition to direct licensing and loyalty to ASCAP played a very small part; and that in general where 3M's proposals were rejected there were legitimate business objections to them. We detail some of these below.

1. *3M's Negotiations With Publishers*

Chappell & Co., Inc. was the first publisher 3M approached. Initially, it found 3M's offer very attractive, but ultimately refused it because of concern that the sale of the M-700 tape would, in effect, put a perpetual free performing right in the hands of 3M's purchasers unless ASCAP licensed and policed those rights. Chappell's concerns appear to have been justified because, as matters turned out, only about a third of 3M's purchasers agreed to pay for licenses to use their tapes after expiration of the initial three year term.

3M next approached MPHC, a publishing company owned by Warner Brothers. MPHC's initial response was favorable, but the MPHC official authorized to make a final agreement was ill, and died during the course of negotiations. By the time he had been replaced, 3M had met its licensing needs. In 1967, 3M negotiated and reached oral agreement with MPHC for licenses covering a subsequent series of tapes, but 3M then decided not to consummate the transaction.

Like Chappell & Co., Famous Music Corp. expressed serious reservations about the possibility of policing the renewal term performance rights, and after consulting ASCAP it rejected 3M's proposal. In 1967, Famous resumed negotiations with 3M for a second tape series and a tentative agreement was reached, but 3M dropped the proposition because at that point it expected to make a bulk licensing agreement with ASCAP covering the second series, which as matters turned out, did not materialize.[18]

The Edwin H. Morris Company did not accept the 3M proposal because it thought, in Morris' words, that 3M was "trying to get something for virtually nothing." (Dep. 131) The evidence establishes that Morris had completely misunderstood the amount of money 3M was actually offering; and that he would have negotiated if there had not been a failure in communication. (Dep. 129-31, 137-41)

Irving Berlin Music, Inc., initially turned down the 3M offer for reasons which are not clear. It appears to have been reluctant to license except through ASCAP, largely

18. However, ASCAP and 3M subsequently reached agreement on a license package for a third series of tapes, the "M-1200".

because 3M proposed to use too small a number of Berlin songs to make a different decision worthwhile. Berlin changed its mind as to the second tape series but again 3M backed out in anticipation of licensing these later tapes through ASCAP.

By the time 3M approached The Richmond Organization it had made sizeable deals with other publishers. Accordingly, it was unwilling to guarantee the use of a sufficiently large number of Richmond songs to make the transaction attractive. Negotiations broke down on that issue. For Richmond, as for other publishers, policing was a problem directly related to the number of songs to be used: above a certain threshold, the cost of relicensing and policing might have become economically worthwhile. For Richmond, that threshold was not reached. Subsequently, Richmond contacted 3M's representative to express its interest in the 3M program, but because 3M wished to use only about 12 Richmond songs, negotiations again fell apart.

In addition to these publishers, 3M failed to conclude agreements with Robbins, Feist & Miller, Bregman, Vocco & Conn, and Frank Music. The first two publishers were the only ones whose reluctance to deal appears to have been motivated from a sense of devotion to ASCAP. Frank Music refused 3M's offer for the initial series of tapes because, like Richmond Brothers, it was concerned about the related problems of policing and the number of tapes to be used. However, it approached 3M to negotiate a license for the second series of tapes and agreement was reached.

We conclude, that, at best, the 3M incident does not favor CBS' case. The publishers which 3M contacted were

offered varying proposals and responded as they thought appropriate to their respective legitimate business interests. Four fifths of them accepted the proposal, the remainder rejected it; and some rejected it the first time around but sought to be included in 3M's second series. The evidence contains no breath of parallel conduct. Those who had fears relating to the problem of relicensing and policing proved to be justified in their fears. Virtually all the publishers responded to 3M's unusual proposal as essentially a clean-cut business proposition; none of them refused entirely to negotiate with 3M. On such a record, no general inference of unwillingness to engage in direct dealing with 3M can be drawn. Even if it could be, it would be unwarranted to impute any such inference to the very different circumstances prevailing in the market for performance rights to music used on CBS.

2. The AGAC Ploy

CBS also stressed the role played by The American Guild of Authors & Composers (AGAC) in the 3M incident in voicing opposition to the issuance of direct licenses by their publishers. AGAC, which is not a party to this action, is a trade association of some 2,400 composers whose traditional concern has been the problems of composers in dealing with their publishers, such as the proper calculation of royalties. About 8% of the writer members of ASCAP and writer-affiliates of BMI are AGAC members. During its 45 year history AGAC has on occasion complained to publishers or to ASCAP and BMI that the interests of its members were not being protected. However, it has never

brought suit against anyone; its principal technique appears to be the enthusiastic use of rhetoric.

AGAC's role in the 3M incident fits this general pattern. Although AGAC responded to the news that publishers had granted licenses to 3M in its typically vociferous way, the actions it took in opposition to the 3M program were untimely and ineffective. 3M started to negotiate with publishers in October, 1964, and by June of 1965 had already licensed the first series of tapes. It was not until November of 1965 that AGAC sent a form letter to publishers protesting that they had failed to secure writer consent for certain songs covered by AGAC contracts and suggesting that publishers refrain from licensing 3M. However, the AGAC letter clearly had no impact on 3M's efforts: it was circulated after licenses had been obtained for the first series, and after the eight publishers who declined the 3M proposal had told 3M of their decision. To this day 3M has continued to obtain licenses for its M-700 series directly from publishers. AGAC has not even attempted to lobby against the practice since 1966.

As CBS points out, a "radical" wing of AGAC which styled itself the West Coast Committee, criticized the AGAC Council for its mild-mannered response to the 3M project, and one of its strident letters appears to advocate a conspiracy by publishers to refuse to deal. However, the central AGAC Council in New York rejected the proposals on the advice of its lawyers.

In sum, CBS has seriously overreacted to the role of AGAC and the West Coast Committee in the 3M incident. Although there is testimony which supports CBS' view that the feelings of some writers run high when talk of direct

licensing is in the air, the significant facts are that AGAC took no effective action against the 3M project and refused to adopt the suggestion of the West Coast Committee that radical action was appropriate. These facts, together with the evidence of AGAC's declining influence over the past ten years, and the strong desire of writers to gain exposure for their work do not support any inference that AGAC would or could take effective action against a direct licensing effort by CBS.

D. The "Music in the Can" Problem

1. The Significance of "Music in the Can"

Television programs or movies which have been filmed or taped are said to be "in the can." Music recorded on the soundtrack of such films or tapes is called "music in the can." At any given time, CBS has a large inventory of programs or feature films, much of which it will rerun over the network. CBS argues that if it cancelled its blanket license, the proprietors of compositions in the can, knowing that the music could not practicably be removed from the soundtrack, would exact premium prices for performance licenses: CBS would be forced to pay these premiums or risk infringement litigation.

CBS claims that by virtue of their leverage, copyright owners of music in the can could easily thwart any direct licensing attempt; and this fact accounts for the "business judgment of the [CBS] management that an attempted by-pass of ASCAP is not a realistic alternative . . ." (CBS Proposed Findings at 60-61). We disagree with CBS'

analysis. Putting aside the fact, noted earlier, that CBS does not appear to have considered the feasibility of direct licensing prior to this suit, evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur.

Indeed, even if CBS had proven that some copyright owners would attempt to extract a premium price for their music in the can, that fact alone would not, absent proof of parallel conduct, tend to establish that defendants have violated the antitrust laws. At any point in the normal course of its business, CBS has a sizeable inventory whose make-up is continuously shifting from one season to the next as old programs and films are "retired" and new ones replace them. CBS obviously knew, when it accumulated its current inventory[19] that some form of performance license would ultimately be necessary for the second runs of the programs and films within it. These circumstances, however, do not result from the fact that CBS has continuously taken a blanket license, by "compulsion" or otherwise. To the contrary, they flow from the networks' practice of rerunning films and programs. Regardless what system of licensing CBS uses, its inventory would be vulnerable to "hold-ups" every time CBS puts music in the can without obtaining performance rights for future runs of the program in question. The fact that CBS has failed to secure such rights for reruns of the present inventory is hardly the defendants' fault. No defendant has ever refused CBS a license for any music in the can or out, if for no other reason than that CBS has never asked.

19. We note in passing that CBS acquired most of its in the can inventory after the commencement of this action (AX 326).

In sum, *any* changeover to direct licensing, even in a world of complaisant composers and publishers equipped with sturdy "machinery" may subject the CBS inventory to hold-ups by the greedy ones among them. However, simple greed, independently expressed, does not constitute a restraint of trade.

In any event, CBS has not proven that its fears of a "hold-up" by copyright proprietors are justified. CBS' principal witnesses in support of its "in the can" theory were its Vice President in charge of business affairs and planning, Donald Sipes, and its economist, Franklin Fischer. Neither of them has ever met a copyright proprietor, nor is either more than cursorily acquainted with the music licensing field. As was true of their testimony on "disinclination," the basis for their conclusion that copyright owners would "hold-up" CBS for rights to music in the can was that it would be economically rational for them to do so (see, e. g., Tr. 1686-87). Even taken alone this is not persuasive evidence, and it is clearly outweighed by the more concrete proof offered by defendants. For example, Albert Berman of the Harry Fox Agency testified that television producers often prepare programs without synchronization licenses and negotiate such licenses *after* the programs are in the can without being "held up."

> "A . . . There is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.
>
> Q Do you have any opinion as to what the basis is for that confidence?
>
> A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (Tr. 981a-82)

Moreover, although we need not reiterate at length the basis of our earlier conclusion that no copyright proprietors would wish to fall into CBS' disfavor, the publishers who testified as to the "in the can" problem confirmed that view. Their statements on the point were highly persuasive. For example, Salvatore Chiantia of MCA Music, Inc. testified as follows:

> "A . . . I believe the question here is whether a music publisher would take advantage—let us discard the term holding up—whether a music publisher would take advantage of a situation in which something has already been recorded and a license is subsequently sought.
>
> There have been any number of occasions when that has arisen in the licensing of mechanical reproduction and in the licensing of motion pictures, theatrical motion pictures.
>
> Very often, a theatrical motion picture will be made and the song recorded and the synchronization license is subsequently sought. In those cases, speaking for MCA, we have never held up anybody. We have never been unreasonable. We have licensed.
>
> In the cases of mechanical reproductions, there are cases in which recording companies actually record a song before ever asking for a license. In those cases we would certainly hold them up if we wanted to, but we don't because it would be bad business practice.
>
> There are some people in our business who make a habit of being unreasonable. There are a number of people. You mentioned Happy Birthday before. There

is another very famous person with whom I have done a great deal of business, who lives in Paris, who makes my life miserable because she refuses to allow me to license under certain circumstances.

Well, those people are generally identified and people watch for them. Certainly in my business of being a music publisher I don't know of any company that has ever had to say, 'Watch out for Chiantia or MCA; they'll get you.'

We know that we are in this business and we intend to stay in this business and the way we stay in the business is by establishing some kind of a rapport and good will with our users and customers.

* * *

We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble." (Tr. 2895-98)

Even assuming, contrary to the evidence, that some publishers would be drunk with power at having CBS on the spot, CBS has overstated the dimensions of the problem. Most of its inventory is comprised of theatrical motion pictures (i. e., movies), most of whose music is theme and background music controlled by the film producer's affiliated publishing company (PX 994, AX 287, BX 167). The "problem" of licensing this music is similar to the problem of licensing the "inside" theme and background music for CBS' regular television programming: it can be obtained from the producer itself. Of course, the producer *could* hold out for a large premium, but only on pain of losing large sales of his principal product, movies, to one of only three potential network buyers. It does not need to be

repeated that the price of music performance rights is a tiny fraction of the price of a program or film.

Most of the remainder of CBS' in the can inventory is regular programming which is often rerun in the course of a season. As discussed earlier, most of CBS' serials use only theme and background music owned by an inside publisher. The factors just described as to movies in the can apply equally to other programs in the can.

Unfortunately, CBS has not offered evidence regarding the average life span of a given inventory of programs and films (or of categories of such programs and films), or the portion of the inventory which it actually intends to rerun. The absence of such evidence renders the "in the can" argument even less acceptable. For example, it may be that some television serials have a basic life of one year; if so, that portion of the inventory would be "consumed" during the inevitable interval between CBS' notice of termination of its blanket license and the date on which it actually commenced direct licensing for all its needs. For these programs, as well as the programs or films which CBS does not intend to rerun, there would be no "in the can" problem because there would be no need for performance licenses.

2. Commercials "in the Can"

CBS also claims that television commercials containing copyrighted music present a similar "in the can" problem. Advertising agencies do not ordinarily purchase performance licenses for the music they use. Instead they get a free ride on the networks' blanket licenses. Accordingly, CBS argues that if it cancelled its blanket license, a number of commercials "in the can" could not be used unless either

the advertising agency or CBS paid the premium license fee which CBS feels sure would be exacted. The claim is without merit. Only a fraction of television commercials use music at all. (AX 263, AX 264) In those which do, the copyright proprietor is normally the advertiser on whose behalf the music was made. As Paul Marks, ASCAP's Director of Operations testified, "most of the commercials use music that is written directly for those commercials, [by an 'inside' composer] and in the overwhelming majority of cases, almost all the cases, the writer grants all rights to the sponsor or the advertising agency and makes no reservation of any rights to receive ASCAP distributions." (Tr. 2548) Of course, the sponsor or the advertising agency is the last person who might be expected to hold up CBS for licenses to use the music in its commercials.

A minimal number of commercials use previously published music for which CBS or the advertising agency would have to obtain a performance license from an "outside" publisher. For example, of the 1300 commercials created by the J. Walter Thompson Advertising Agency in 1972, only 21 used copyrighted music (AX 263, AX 264), or less than 2%. As to this miniscule percentage, it is worth repeating that few music publishers would hold up CBS or the world's largest advertising agency for a premium if they hoped to have their music used in preference to that of another publisher. Indeed, because commercials have a normal life span of six to eighteen months (Tr. 1873) CBS might well avoid any problem otherwise posed by "commercials" in the can simply by giving reasonable notice of the cancellation of its blanket license: most of the commercials in question would have run their short life before CBS commenced a direct licensing system.

X.

A Word About Per-Program Licenses

As outlined earlier, CBS concedes that it could license the music for most of its entertainment programs without difficulty by requiring the program packager to deliver performance rights together with the rest of the package. A substantial portion of CBS' other programming, such as news and public affairs programs, makes little or no use of previously published music. As to these two large categories, therefore, CBS could license the music used on an other-than-blanket basis. The programs which make by far the heaviest use of "outside" published music are weekly variety shows and variety specials, late-night talk shows, and the "Captain Kangaroo Show," which in the aggregate comprise a very small portion of CBS' program schedule. Assuming, contrary to the evidence, that the changeover to direct licensing would necessarily meet with mechanical problems until the "machinery" was properly oiled and adjusted, such problems would be acute only in relation to the few shows, such as variety shows, which regularly use music of outside publishers and are produced on short production schedules. For such shows, where speed and efficiency in clearing performance rights may be at a premium, a per-program license, which the consent decrees require ASCAP and BMI to offer, could be a logical alternative. Such a license gives the user unlimited access to the entire repertory, but requires him to pay only with respect to programs which actually use ASCAP (or BMI) music.

Although CBS has never sought to negotiate with ASCAP or BMI for a per-program license, it argues that such a license is not a feasible alternative. The argument is based on the assumption that the provisions of the per-program license negotiated between ASCAP and an All Industry Committee of owners of local television stations would be imported wholesale into any per-program license for network television use. (CBS Proposed Findings at 108-09) The local television license form provides that the station can avoid paying a per-program license fee for certain uses (e. g., motion pictures) only by obtaining direct licenses for all of the music contained in the program and by giving ASCAP seven days' notice of the direct license. CBS claims that such a license would not meet its needs because of the possibility that for a given variety program it might be successful in obtaining direct licenses for, say, only 90% of the music it needs, but would still need to purchase a per-program license at the full rate to cover the remaining 10%.

The argument overlooks several critical facts. CBS is of course not bound to agree to the terms of the local station per-program license, nor may ASCAP or BMI insist on any particular terms. To the contrary, they are required by the respective consent decrees to offer per-program licenses on terms which are justified by applicable business factors[20] and which give the user a genuine choice between it and other forms of license, such as the blanket license. Because CBS has never sought to negotiate a per-program license, there is no way to know what its

20. See notes 3 and 5, *supra*.

terms might be. For example, there is no legal obstacle and no evidence of an unmanageable factual obstacle which would prevent it from bargaining for a license which gave it "credit" (i. e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question. Indeed, because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions,[21] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program. In view of these facts CBS' claim that the per-program license is not suitable for its needs is, at best, premature. Indeed, because CBS makes heavy use of "outside" music on very few programs, there appears to be no reason why CBS could not feasibly turn to a combination of direct licenses, for shows using inside music or outside music of the one or two publishers; and per-program licenses, for those programs on which it makes heavy use of outside music.

XI.

Summary of Findings

On review of the record, we conclude that CBS has not met its burden of proving that defendants illegally restrain trade in the market for performance rights for network television use, and compel it to take a blanket license as alleged in the complaint. CBS has failed to prove that there are significant mechanical obstacles to direct licens-

21. See note 4, *supra;* CX 3.

ing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.

Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissolve, and that CBS could easily fill its music needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur.

We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem. The risks which CBS claims are posed by direct licensing realistically exist only if CBS ignores its own axioms about "reasonably prudent" network managers (e. g., CBS Post-Trial Brief at 33, 36) and abruptly cancels its blanket license. There is little question that if CBS took such a course, its licensing efforts would produce temporary confusion and disarray. However, the taking of such a voluntary "risk" cannot itself act as a

predicate for defendants' antitrust liability. Conversely, and more significant, CBS has considerable control over the degree of risk which a direct licensing attempt would involve. Assuming a reasonable period of preparation prior to the commencement of full-scale direct licensing, there are a number of steps CBS could take to assure the success of its efforts, particularly given its leverage with program packagers and, by extensions, with their publishing subsidiaries. For example, prior to cancellation of its blanket license, CBS might negotiate with the producers of its programs and films using "inside" music to secure favorable prices for licenses for music "in the can," and for music contained in new programs to be shown in the upcoming season; it could build up a large reservoir of music by requiring program packagers affiliated with major publishers to make their catalogs available for direct licensing in accordance with a fee schedule; it could negotiate with independent publishers for either "mini-blanket" licenses covering their catalogs or direct licenses using a fee schedule; it could send notices to all publishers of its intention to seek direct licenses for compositions in their catalogs; it could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing that, it could bring proceedings under the consent decree.

There is an astonishing lack of evidence that CBS considered such possibilities, or even the feasibility of direct licensing as a general proposition before commencing suit. The fact that it did not do so does not in itself defeat its claims, but it has rendered the nature of its proof at trial largely speculative. CBS' evidence was

for the most part addressed to such abstract issues as "disinclination," and brought out through the generous use of hypothetical questions. However, it is proof of the threat of actual anticompetitive conduct, not possible "disinclination" which violates the antitrust laws. CBS might have obtained such proof by attempting to negotiate direct licenses. The proof which it chose to offer instead, as to the alleged fear or disinclination of copyright proprietors to engage in direct dealing, is not sufficient to establish an illegal restraint of trade. Such evidence does not prove that CBS needs, as it claims, the "signal" of a judgment in this suit to bring about a direct licensing system; it indicates rather that CBS has the power to give a clearly audible signal itself.

XII.

Conclusions of Law

As stated early in this opinion, the pre-trial order specified the following issues:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

The conclusion which inescapably follows from the evidence outlined in the body of the opinion is that CBS has failed to establish that defendants' conduct constitutes an actionable restraint and compels CBS to take a blanket

license. The complaint alleges that defendants' acts and practices in licensing performance rights for network use constitute several distinct violations of the antitrust laws. Because CBS has failed to prove the factual predicate of its claims—the non-availability of alternatives to the blanket license—the complaint must be dismissed. We detail our conclusions of law below.

1. The claim that members and affiliates of ASCAP and BMI have illegally combined to eliminate price competition among themselves must be dismissed because CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.

2. The claim that members and affiliates of ASCAP and BMI have combined to fix the price at which CBS must license performance rights by licensing those rights only in a package must be dismissed because CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. To the contrary, the record establishes that CBS has always negotiated the price for its licenses with ASCAP and BMI.[22] Moreover, CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license.

---

22. We note, moreover, that contrary to CBS' claim that the blanket license fee is unrelated to the extent of the networks' use of music, the only evidence on the point indicates that the extent of CBS' music usage has always been a significant factor in negotiations for the fee paid on renewals of CBS' blanket license. (Tr. 3611, 3870-72).

3. The claim that ASCAP and BMI have conditioned the licensing to CBS of music that it wishes to use upon the licensing of music it does not wish to use must be dismissed because CBS has failed to establish (a) that there were two separate and distinct "products" (i. e., groups of compositions, of which CBS wanted to purchase only one); (b) that CBS negotiated with ASCAP or BMI to license only the "wanted" compositions; and (c) that ASCAP and BMI refused to negotiate on that basis and had to coerce CBS to license the "unwanted" compositions as a condition of licensing the "wanted" compositions.[23]

23. In its post-trial reply brief CBS raises a new and somewhat puzzling variation of its claim that ASCAP and BMI are guilty of imposing unlawful tie-ins. CBS points out that ASCAP and BMI offer their members the services of monitoring and policing music uses and collection and distribution of royalties, and claims that neither organization offers such services to any user of music, such as CBS, "*unless* the user accepts a blanket license; and offers none to any member *unless* that member sells through the blanket license" (CBS Reply Brief at 14, emphasis in original). The claim is without merit. As to the first branch of the argument—that ASCAP and BMI condition the sale of their "auxiliary" services to CBS on its purchase of a blanket license, CBS cannot have been the victim of a tie-in because it has never purchased such services; only members and affiliates of ASCAP and BMI have done so. If CBS' claim is construed more charitably to be that ASCAP and BMI would refuse to sell such services to CBS (which CBS could use to induce copyright proprietors to engage in direct dealing) *unless* CBS also purchased a blanket license, the claim still fails as a matter of law: CBS has never sought to purchase "only" services, and there is no evidence that if it did so ASCAP and BMI would condition their sale on the purchase of a license CBS does not want.

The claim that ASCAP and BMI condition the sale to their members and affiliates of their services as licensing agents on their "purchase" (through administrative charges against royalty distributions) of auxiliary services such as monitoring is also without merit. CBS has no standing to assert such a claim because the member or affiliate, rather than CBS, is the alleged victim of the tie. Putting aside the conceptual difficulties presented by CBS' position, there is no evidence that ASCAP and BMI have refused or would refuse to monitor uses and collect royalties on behalf of members and affiliates who engaged in direct negotiations and wished to have the convenience which a central agency offers. To the contrary, there is every reason to believe that ASCAP and BMI would want to preserve this branch of their business even if they were forced to forego the issuance of blanket licenses. In addition, there is no evidence that if necessary copyright proprietors would not readily forego such services to have their compositions performed on CBS. Copyright proprietors certainly do not indispensably need ASCAP or BMI to perform the function of collecting their royalties; the producer using the music would simply remit payment to the proprietor, or to Harry Fox or a similar organization. Nor does it appear that however convenient the present arrangement may be, the producer is indispensably dependent on ASCAP and BMI to monitor possible infringements by a large television network which performs music before millions of viewers; certainly CBS cannot be expected to argue the contrary.

(footnote continued on next page)

4. The claim that ASCAP members and BMI affiliates are guilty of a group boycott by forming the ASCAP and BMI music pools and authorizing their licensing agents to license only on terms that foreclose CBS from dealing directly with copyright owners must be dismissed because CBS has failed to prove that the licensing authority of ASCAP and BMI is limited to such terms, is exclusive in fact or that copyright owners have refused or would refuse to deal with CBS directly on an individual basis.

5. The claim that ASCAP members and BMI affiliates are guilty of copyright misuse must be dismissed because CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license.

6. The claim that defendants are guilty of monopolization, both attempted and achieved, must be dismissed. The offense of monopolization consists of two elements: possession of monopoly power in the relevant market and willful acquisition or maintenance of that power as distinct from growth as a consequence of a superior product or historical accident. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Attempted monopolization is established by a showing of specific intent to monopolize with a "dangerous probability" of succeeding. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *Swift & Co.* v. *United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905). CBS has failed to prove these elements.

To begin with, we disagree with CBS' argument that the relevant market is the market for BMI and ASCAP blanket licenses. The proposition is based on a factual premise which is rebutted by the evidence: that blanket licenses are the sole method for securing performance rights. Manifestly, ASCAP and BMI are not the sole source of the performance rights CBS needs; they are merely the sole source of the blanket licenses which CBS does not want. A market whose only product CBS does not want to purchase cannot by definition, be a relevant market, and the monopolization of a market in which CBS does not want to buy (and in which, of course, it need not buy) cannot injure it.

The relevant market is the market for performance rights to compositions suitable for television network use. The classic test for determining the relevant market in suits brought under §2 of the Sherman Act is whether

products are "reasonably interchangeable by consumers for the same purposes." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). Products are said to be interchangeable when they can be used for the same purpose, and when a purchaser is willing to substitute one for the other. *United States* v. *Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 (E.D.N.Y. 1965, Mishler, J.). It is evident (indeed it is CBS' premise in this suit) that a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license permitting the use of exactly the same music. Moreover, because the evidence establishes that musical compositions are fungible, a virtually unlimited number of *combinations* of compositions (i. e., bundles of licenses negotiated on a direct basis) sufficient for CBS' music needs would be readily interchangeable with a blanket license. Accordingly, the relevant market includes *all* sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of "direct" licenses.

CBS has not proven that ASCAP or BMI possesses, or has attempted to achieve monopoly power in the market for performance rights for network use. In *United States* v. *Grinnell Corp.*, *supra*, 384 U.S. at 571, 86 S.Ct. at 1704, and *United States* v. *E. I. duPont de Nemours & Co.*, *supra*, 351 U.S. at 391, 76 S.Ct. at 1005, the court defined "monopoly power" as the "power to control prices or exclude competition." CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright pro-

prietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place. Indeed, as noted earlier, the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees.

Nor does ASCAP or BMI have the power to exclude competition: there is a high degree of interchangeability among compositions, and performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them. In addition to the choice of a blanket license or a per-program license from ASCAP or BMI for any given type or group of compositions, any composition (or combination of compositions) or its practical equivalent could be licensed from several individual copyright proprietors.

Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent. The fact that CBS now wishes to change its long standing business practices does not, without more, convert defendants into monopolists.

CBS has failed to prove that any activities of ASCAP and BMI and their members and affiliates threaten it "with loss or damage by reason of any violation of the antitrust

laws" within the meaning of §16 of the Clayton Act. Even assuming, contrary to the evidence, that CBS has established the possibility of an impending violation on the part of some individual defendants, it has not established the threat of loss or damage sufficiently to warrant the grant of an injunction against the issuance of blanket licenses to any television network, or establishing its proposed "per-use" system.

The foregoing constitutes our findings of fact and conclusions of law. The complaint is dismissed.

It is so ordered.

Appendix C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August, one thousand nine hundred and seventy-seven.

Present:

Hon. LEONARD P. MOORE,
Hon. ROBERT P. ANDERSON,
Hon. MURRAY I. GURFEIN,
Circuit Judges.

75-7600

Columbia Broadcasting System, Inc.,
Plaintiff-Appellant,

v.

American Society of Composers, Authors & Publishers, Stanley Adams, as President of American Society of Composers, Authors & Publishers, Harold Arlen, Samuel Barber, Carl Fischer, Inc., Chappell & Co., Inc., Cy Coleman, Edwin H. Morris & Co., Inc., Elkan-Vogel, Inc., Essex Music, Inc., Famous Music Corp., G. Schirmer, Inc., Morton Gould, Arthur Hamilton, Henry N. Mancini, MCA, Inc., Peter Mennin, Milene Music, Inc., Robbins Music Corporation, Richard Rodgers, Arthur Schwartz, Shapiro, Bernstein & Co., Inc., Warner Brothers-7 Arts Inc., Ned Wash-

ington, on behalf of themselves and all other members of American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Al Gallico Music Corp., Paul Anka, Associated Music Publishers, Inc., Jerry Bock, Duchess Music Corp., Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Screen Gems-Columbia Music, Inc., Joseph Stein, Sunbeam Music, Inc., Unart Music Corp., on behalf of themselves and all others who have granted themselves and all others who have granted Broadcast Music Inc., the right to license to third parties non-dramatic performing rights of their copyrighted music,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By ARTHUR HELLER,
Deputy Clerk

Appendix D

Orders of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Present:

Hon. LEONARD P. MOORE,
Hon. ROBERT P. ANDERSON,
Hon. MURRAY I. GURFEIN,
Circuit Judges.

Docket No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, *et al.,*
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee, American Society of Composers, Authors and Publishers,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO

A. DANIEL FUSARO,
Clerk

MOORE, *Circuit Judge*:

I vote to deny the petition for rehearing with a suggestion of rehearing *en banc*. I do so only on the theory that Part III of the majority opinion remanding for further proceedings requires consideration by the trial court after proof and/or argument of the effect on price competition of the blanket license and some form of per use license. Proof should also be developed which will support or disprove the majority's assumption (thus far unsupported by proof as I see it) that the blanket license "reduces price competition among the members and provides a disinclination to compete". (p. 5189). Such lack of evidence is also conceded by the majority with respect to a finding on "market need". In short, I believe that a rehearing at this time would be premature.

As for ASCAP's argument that further proceedings "will be time consuming and expensive" and as for their desire to try many other issues, this would be a situation of their own making. It would seem to me that the issue of a practical and workable blanket-per use decree need not be befogged by a contention that "CBS's market power is too great".

Appendix D

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held a [*sic*] the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Docket No. 75-7600

Columbia Broadcasting System, Inc.,
Plaintiff-Appellant,

v.

American Society of Composers, Authors and Publishers, *et al.*,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellee, American Society of Composers, Authors and Publishers, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Irving R. Kaufman

Irving R. Kaufman, Chief Judge

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

ROBERT H. BORK
127 Wall Street
New Haven, Connecticut 06520
(203) 436-0165

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

Aaron Copland, *et al.*, submit this brief as *amici curiae* in support of the petition for certiorari to review the judgment entered by the Court of Appeals for the Second Circuit on August 8, 1977. Eubie Blake, Sammy Cahn, Betty Comden, Hal David, Ira Gershwin, Adolph Green, Gian Carlo Menotti, Vincent Persichetti, Ned Rorem, William E. (Billy) Taylor, Virgil Thomson, and the Estates of Bela Bartok, Edward Kennedy (Duke) Ellington and Igor Stravinsky join in this brief as *amici curiae*. Consent to submit this brief has been obtained from all parties and their letters have been lodged in the clerk's office of this Court.

Interest of *Amici Curiae*

The *amici curiae*, Aaron Copland, *et al.*, are composers of music, authors of lyrics for music, and members of the American Society of Composers, Authors and Publishers (ASCAP). These *amici curiae* have interests in this litigation of several kinds.

The decision of the panel majority of the Court of Appeals for the Second Circuit to the effect that ASCAP's method of licensing performance rights for the *amici curiae's* copyrighted works constitutes price fixing, which is illegal per se under Section 1 of the Sherman Act, may be read to mean that *amici* and other members of ASCAP were parties to an illegal combination. *Amici* may be exposed to treble damage liability and may have to incur literally ruinous legal expenses in defending themselves. *Amici* have, therefore, a great personal interest, quite apart from their interest in ASCAP's survival and effectiveness, in a prompt appellate determination by this Court of the novel per se rule fashioned by the court of appeals.

The per se rule created by the court of appeals majority, if it were applied according to its apparent rationale, would appear not only to outlaw blanket licensing but any form of licensing that an organization like ASCAP could engage in. If that were to happen, and if ASCAP were effectively destroyed, these *amici* and other current members of ASCAP and BMI would be left without effective means of seeing that royalties were paid for the performance of their works by the tens of thousands of users of music in the United States. Composers, authors, and publishers would be thrown back to the unhappy condition in which they existed prior to the organization of ASCAP. The copyright laws of the United States gave such composers, authors, and publishers of music the legal right to receive royalties for the performance of their works but that legal right was largely worthless because of the utter impossibility of private individuals learning of all such performances and either negotiating satisfactory licenses or suing for infringement. *Amici* and others similarly situated would be legally and practically helpless to protect themselves and their means of livelihood.

If the new per se rule, and the accompanying decision that *amici's* copyrights have been misused, is not promptly reviewed, it is entirely possible that ASCAP will be financially destroyed by antitrust and misuse litigation with myriads of licensees all over the United States. This may happen even though ASCAP should ultimately prove correct on the legal issue. This result would also leave composers, authors, and publishers helpless to enforce their legal rights under the copyright laws until such time as a new organization could be created and put into operation. *Amici* would lose heavily both as a result of the costs imposed upon ASCAP and as a result of the absence, even if temporary, of an effective licensing and policing organization.

Questions Presented

1. Whether the diminution of price competition that necessarily occurs within any joint venture or other economic integration, such as a partnership or corporation, is per se illegal under Section 1 of the Sherman Act.

2. Whether an antitrust court has authority to enjoin one form of distribution, here blanket licensing, and order as a remedy another form of distribution, per use licensing, when per use licensing does not eliminate or reduce the illegality the court perceived and hence cannot be preferred to blanket licensing by the Sherman Act.

Statement of the Case

Respondent Columbia Broadcasting System, Inc. (CBS), filed an antitrust action against petitioners ASCAP, Broadcast Music, Inc. (BMI), and certain individual members of each organization, alleging that the use of blanket licenses by ASCAP and BMI violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. A blanket license is one by which ASCAP for a stated term and royalty authorizes the licensee to perform any copyrighted work that ASCAP has the right to license. CBS alleged that price competition was eliminated between members of ASCAP, that licensing copyrights not used with those that were used constituted an illegal tie-in, that by dealing through ASCAP copyright owners were engaged in a concerted refusal to deal, and that ASCAP had attempted and achieved monopolization. CBS also charged that these activities constituted copyright misuse. CBS sought only injunctive and declaratory relief.

The district court severed the issues of liability and relief and, after a nonjury trial of liability, held that the defendants had not violated the Sherman Act and had not misused their copyrights. It dismissed the complaint. The opinion of the district court is reported at 400 F. Supp. 737.

The court of appeals opinion, reported at 562 F.2d 130, held that none of the district court's extensive findings of fact were "clearly erroneous," unanimously affirmed the holdings that the defendants had not engaged in any of the illegalities charged, with one exception. A majority of the three-judge panel held as a matter of law on the facts found by the district court that the blanket license involves price fixing and so is rendered illegal per se by Section 1 of the Sherman Act as interpreted by *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940). The copyrights were held to have been misused for the same reason. Price fixing was held to exist because members licensing through ASCAP did not engage in price competition with one another but shared in the proceeds of the license. The majority held further that there is a defense to price fixing that would otherwise be illegal where the price fixing "is absolutely necessary for the market to function at all," 562 F.2d at 136. The defense was held unavailable here because CBS could obtain licenses directly from individual copyright owners, a right guaranteed by ASCAP's consent decree with the government.

The case was remanded for consideration of a remedy consisting of "some form of per use licensing," 562 F.2d at 140. A per use license involves a royalty payment for copyrighted works actually performed. The majority stated, however, that the blanket license, which it had held illegal per se, need not be prohibited in all circumstances. "The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction," because some licensees might find it desirable, 562 F.2d at 140. The court also indicated that the "market necessity" defense might per-

mit blanket licensing with respect to some classes of licensees, apparently without regard to their desires.

The concurring judge stated that he agreed that a remand for remedy proceedings was proper so that a practical method of adding per use licensing could be evolved, but added, "I do not agree that 'the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense,' " 562 F.2d at 141. This appears to be a statement that ASCAP has not violated the law but that relief should be granted to CBS.

Reasons for Granting the Writ

I. There is a conflict between the Circuits and further conflicts are almost certain to occur.

The decision of the court of appeals majority in this case is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968). Though the majority in this case stated it had no quarrel "with the *result* reached by the Ninth Circuit in *K-91,*" 562 F.2d at 138 (emphasis in the original), the majority made it very clear that it rejected the legal rule enunciated by the Ninth Circuit. That rule would have required judgment for ASCAP here.

K-91 arose when several copyright owners sued a radio station operator for copyright infringement because the operator, K-91, had played their musical compositions on the air without the owners' permission or consent. *K-91* raised

antitrust charges, including an allegation that ASCAP and the copyright owners, who were members of ASCAP, had conspired to fix prices in violation of Section 1 of the Sherman Act. The antitrust charges were raised both as a defense of misuse and as a basis for a counterclaim seeking triple damages. The district court ruled for the copyright owners.

The court of appeals affirmed:

> We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. . . . ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the, applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. . . . In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.
>
> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved.

372 F.2d at 4.

A majority of the Court of Appeals for the Second Circuit in the present case, however, explicitly disagreed with

the Ninth Circuit on these points. The Second Circuit majority held that the decree did not help ASCAP since a district court determination of a "reasonable" price did not change the fact that a combination (ASCAP) had fixed the price and that reasonableness was no defense to price fixing. The Ninth Circuit's point, however, had been that when the district court set the royalty, ASCAP was not fixing the price, and the prospective licensee had the option of getting the court to do just that in every instance.

Despite the fact that the Ninth Circuit found the right of prospective licensees and individual copyright owners to deal directly to be an additional reason why ASCAP did not violate the antitrust laws, the court of appeals here suggested that no such competitive market had been available in the circumstances of *K-91,* and went on to say that the very fact that such direct dealing was possible here meant the availability of a judicially supervised price did not serve to acquit ASCAP of price fixing.

Though the Second Circuit Court of Appeals majority distinguishes *K-91* by relying on a stipulation of the parties that no direct dealing of licensees and owners was possible there, the Ninth Circuit made no mention of that stipulation, and the legal rules enunciated by the two circuits are in diametric opposition.

This Court, we submit, should resolve this conflict between the circuits, particularly because the correct legal rule is of enormous importance to a vast industry. For years, the entire industry has operated on the assumption that the consent decree, which has been intensively negotiated and amended from time to time, stated the application of the antitrust laws to this complex industry. *K-91* gave

additional good legal ground for that belief. The present case, which conflicts with *K-91,* has thrown the situation into turmoil. Other litigation is beginning because of the Second Circuit's ruling, and it appears certain that there will shortly be more conflicts between the circuits, adding to the unsettled condition of the industry.

II. The decision of the court of appeals rests upon serious misinterpretations of the Sherman Act that are apparent on the face of its opinion.

There is no dispute over facts but merely a clearcut legal issue. The court of appeals held that the findings made by the district court, which were not clearly erroneous, disposed of the charge that ASCAP's blanket license involved an illegal tie-in or block-booking. The two judge majority held, however, that the blanket license involves price fixing which is made illegal per se by Section 1 of the Sherman Act. It therefore remanded for remedy proceedings for the purpose of requiring ASCAP to offer per use licensing as well as blanket licensing.

There are several legal anomalies in this reasoning, but we regard two propositions as each dispositive and requiring reversal. First, the court of appeals majority ruled that the illegality arose because, when they license through ASCAP, composers, authors and publishers do not compete on royalty rates. But that fact does not constitute illegal price fixing within any known interpretation of Section 1 of the Sherman Act. It cannot be held per se illegal without condemning other, obviously lawful, forms of economic activity. Second, if blanket licensing were thought to be price fixing, the principle that so defined it would be at least equally applicable to per use licensing, or indeed to

almost any licensing an organization like ASCAP could engage in. A court purporting to act under the antitrust laws lacks power to order a change from one form of distribution to another when the former is, at worst, identical in the contemplation of those laws.

A. *ASCAP's blanket license does not involve price fixing.*

The panel majority's opinion shows on its face that it thought price fixing was involved not merely in ASCAP's blanket license but in almost any conceivable activity of ASCAP as an agent for composers, authors, and publishers. (The concurring judge took the curious position that ASCAP had not violated the law but that relief should be entered against it.) The majority stated:

> The charge that there is a restraint of trade by price fixing is founded upon the conception that when any group of sellers or licensors continue to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable,* the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.

562 F.2d at 137-38 (emphasis in the original).

The majority concluded that there existed, therefore, a combination which tampers with price structures and thus engages in unlawful activity within the meaning of *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940). It continued:

> There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition . . . .

562 F.2d at 136.

It is to be noted that the court of appeals' "price fixing" rationale has nothing to do with the form of licensing used by ASCAP; it is an objection to ASCAP determining the compensation of its members, and that objection would apply unless members bid competitively through ASCAP to get their works performed.

Though it is not the case that ASCAP pays compensation to those whose "wares" or copyrights are not used (most members never receive an ASCAP check), the clear legal error of this reasoning lies in applying to an economic integration, or joint venture, the rule of per se illegality appropriate to cases like *Socony-Vacuum,* involving a naked restraint, where the suppression of competition is the sole object of the combination. ASCAP, on the contrary, performs a vital and legitimate economic function that cannot be performed at all if no diminution of competition within the organization is permitted by law. In this, it resembles such familiar examples of economic integration as law firms and league sports. It makes no more antitrust sense to say that the Sherman Act forbids the existence of ASCAP than it would to say the law equally prohibits law firms or sports leagues.

ASCAP was created because individual composers, authors, and publishers were helpless to police the performance of their copyrighted works and thus did not realize the royalty income to which the law entitled them. ASCAP, therefore, took over the functions of licensing and policing that were utterly beyond the capabilities of individuals or smaller associations. Without ASCAP and BMI these functions would not be done. A law journal comment shows why:

> Without ASCAP, licenses for individual performances would have to be negotiated, and all performances would have to be policed by all composers. The costs would be enormous. A single radio station, for example, may broadcast as many as 60,000 performances of recorded musical compositions each year, involving as many as 6,000 separate compositions. As of 1975 there were 7,158 radio stations in the United States, as well as some 714 television stations and thousands of restaurants, bars, hotels, theaters, and other businesses that use ASCAP music. It has been estimated that there are now over one billion licensed performances of ASCAP music annually.*

That is why ASCAP, which is a clearinghouse for performing rights to copyrights held by 16,000 composers and authors and 6,000 music publishers, must exist. Moreover, there is within ASCAP all the competition between copyright owners that is possible. Each copyright owner is compensated through a complex formula that reflects the popularity of, and demand for, his product. If the owner's work is not performed, he is paid nothing. This highlights the essential dissimilarity between ASCAP and a

* Comment, "*CBS* v. *ASCAP*: Performing Rights Societies and the Per Se Rule," 87 Yale L.J. 783, 786 (1978) (footnotes omitted).

cartel in which the inefficient producer is guaranteed a share of the market and a profit in order to dissuade him from competing.

No more competition is possible within a joint venture in licensing and policing, which ASCAP is. The decree under which ASCAP operates provides that its members may deal individually with licensees. But it is both physically and commercially impossible for ASCAP itself to become a market resembling a stock exchange by keeping in continual communication with all of its members, advising them of every potential licensee's interests and asking for bids, advising again of competitive offers, and continuing the process until all bids were in and the licensee able to pick among them. Every successful composer, author and publisher would have to spend a substantial part of his day at a computer terminal receiving information about what every other member was asking and continually adjusting his own royalty demands. Though that is obviously impossible, it would be the only process that could avoid the court of appeals' ruling that there must be a competitive market inside a joint venture.

CBS has claimed that ASCAP, with modern computer technology, could run an internal market for CBS. ASCAP has denied that. But if we assume, solely for the argument here, that CBS is correct, it would make no difference under the law. On such an assumption, ASCAP might be able to run a computerized internal market for any one licensee of any type, but what has been said shows the impossibility of bringing copyright owners together in a bidding situation as to all licensees, or, indeed, for any large number of the tens of thousands of licensees. There

is no Sherman Act principle that CBS or any other licensee has a right to an internal bidding system that might, arguendo, be created for one but not for all. Every licensee would have an equally good claim and the law does not require that CBS be preferred.

In this inability to function and simultaneously provide a fully competitive market internally, ASCAP precisely resembles a major law firm. When clients come to a law firm with complex pieces of work, the firm assembles the talents of the lawyers at its call and determines the rewards of each. The panel majority's rationale would call that a combination that tampers with price structures and illegal per se under *Socony-Vacuum*. Presumably, in order to comply with the Sherman Act, the individual lawyers in the firm must bid against one another to work on every client's case.

The law has condemned naked restraints, it has had difficulty with ancillary restraints, but it has never, until now, made the mistake of condemning that diminution of competition which, of necessity, occurs within an economic venture such as a partnership or ASCAP. As Judge Taft put it at the outset of antitrust policy: "when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Taft was talking not about ancillary restraints, which he discussed next, but about the inherent restraint that occurs whenever men cooperate in a useful economic function.

The rationale advanced by the two judges in the court of appeals, contrary to this ancient and sound learning, if applied consistently, would make any economic integration unlawful—not merely ASCAP and law partnerships but corporations, sports leagues, joint ventures, and family farms—because each is a combination of persons who could operate individually, yet, within the unit, are rewarded not by open market competition with one another but according to a determination made by the economic unit of how much each should receive. Any principle making that illegal is inconsistent not merely with antitrust but with even the most primitive economy. It is precisely what Justice Holmes warned against: "an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 411 (1904) (dissenting opinion).

The court of appeals majority struck down blanket licensing to CBS on a rationale that is irrelevant to blanket licensing but which would outlaw the existence of ASCAP and all other economic integrations.

B. Since per use licenses do not provide more price competition than blanket licenses, per use licenses are not preferred by the Sherman Act, and the court of appeals lacks authority to order per use licenses substituted for blanket licenses.

The objection voiced by the court of appeals majority, that under blanket licensing ASCAP sets the royalties to be paid copyright owners, applies as well to per use licensing. We have shown that the objection is really to the

existence of a performing rights society and, for that reason, no shift in license practices will eliminate the feature the majority below erroneously saw as price fixing. Thus, the per use license, which will require ASCAP to determine royalties, will necessarily involve that "threshold elimination of price competition" that the court of appeals held to be the vice of the blanket license.

The function of an antitrust remedy is to replace an illegal situation with a legal one, not to give the plaintiff his choice of distribution practices without regard to their respective legal statuses. Since blanket and per use licenses have the same characteristics with respect to ASCAP's determination of payments to copyright owners, they are either both lawful or both unlawful. If the blanket license is lawful, the court has no power to order the per use license substituted for it. If both licenses are unlawful, the court has no power to order either one used.

III. The legal error made by the court of appeals majority will have serious and widespread consequences.

The misconstruction of Section 1 of the Sherman Act by the court of appeals majority will have serious and damaging consequences to these *amici curiae,* the music industry and ASCAP, and to the administration of the Sherman Act. Such consequences include the following:

(a) Not only ASCAP and BMI but all of their members —composers, authors and publishers, including these *amici* —will be exposed to heavy legal costs in defending themselves against other lawsuits, and will be exposed as well to potentially ruinous triple damage liability. The fact that

CBS has so far not sought treble damages does not foreclose others. Even if the rule of the court of appeals majority is ultimately overturned and such cases defended successfully, as we are certain they would be, the legal costs alone could be devastating to individual composers and authors.

(b) The music industry has been plunged into turmoil because long-established licensing practices sanctioned by a decree with the government have suddenly been declared per se illegal in some but not all situations. No one knows where the practice may be used and where not. As the court of appeals, 362 F.2d at 140 n.26, stated:

> "In not reaching the same result as the Ninth Circuit did in *K-91,* we in no way, intimate that we would have held the blanket license to the single radio station to be unlawful, or that the blanket licenses given by ASCAP generally are unlawful. The *K-91* result was, in our view, entirely justifiable as an example of market necessity. Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations."

CBS may concede it, but there is no reason to suppose that the great number and variety of licensees in this country will accept such a concession on their behalf, and the prospect is for almost endless litigation between ASCAP and its members, on the one hand, and, on the other, all types of licensees in all of the circuits of this nation until this Court ultimately settles the issue of the legality of ASCAP's licenses. Costs of litigation will be enormous and may prove prohibitive for ASCAP. If that happens, an organization on which composers and authors absolutely rely will have been destroyed by the confused opinion below.

But that prospect aside, licenses and fee arrangements will be disrupted for years to come.

This effect is multiplied by the court of appeals' statement, 562 F.2d at 141 n.29, that the copyrights licensed by ASCAP have been misused, a holding based upon the reasoning that led the court to conclude there is illegal price fixing and which must fall with that conclusion. Some licensees may not wish to initiate antitrust actions but may be willing to withhold license fees, wait to be sued, and defend on grounds of misuse. This has begun to happen already.

(c) A rule of per se illegality has been fashioned which is at once novel, clearly wrong, and capable of destroying ASCAP and any other organization formed to protect composers, authors, and publishers. That rule will predictably be raised in litigation attacking other forms of joint venture or necessarily cooperative forms of economic enterprise.

(d) In an apparent attempt to compensate for the obvious defects of its overbroad per se rule, the court of appeals majority invented a so-called "market necessity" exception. The meaning of this new idea is unclear since the court of appeals said only: "In short this concept holds that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all," 562 F.2d at 136. We do not know quite what that means, but the court suggested it might mean that blanket licenses were allowable with respect to night clubs and skating rinks, among other licensees. The concept's only apparent rationale is that price fixing is allowable where costs of doing business (transaction costs) would otherwise be too high.

The market necessity defense manages to be at once too broad and too narrow. It is too broad because any defendant can raise it in any price fixing case—contending, for example, that price competition would increase uncertainties, and hence costs, to the point where the market would not function. The defense might almost invariably fail, but its availability would complicate trials and destroy the efficacy of the per se rules. Indeed, if the defense is accepted, it would be equally applicable to cases involving other per se rules—those, for example, against horizontal market divisions and concerted refusals to deal.

The concept of market necessity is also too narrow because it does not, so far as one can tell, permit agreements which greatly improve the efficiency of joint ventures but are not "absolutely essential" to the existence of some market. It is common, for example, that partners in a law firm agree not to take business individually in competition with the firm. That has always been thought a legal restraint because properly ancillary to a lawful joint venture. It makes the law firm a more efficient economic unit. But can it be said that such an agreement is "absolutely necessary" for the market for legal services to function at all? It would seem not. Thus, the per se rule against any elimination of price competition within a joint venture or economic integration would attack the most usual and useful forms of partnership, and the "market necessity defense" would fail to save them, though it would spill over into, and complicate the trials of, naked restraints as to which there has never before been any defense.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted. Should the Court agree that the legal error committed by the majority of the court of appeals is clear, it may wish to consider summary reversal.

Respectfully submitted,

Robert H. Bork
127 Wall Street
New Haven, Connecticut 06520
(203) 436-0165

May 12, 1978

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners American Society of Composers, Authors and Publishers, et al.

Of Counsel:

ALLAN BLUMSTEIN
MAX GITTER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, New York

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

CBS, instead of directing its brief to the central question of whether the issues of antitrust and copyright law raised by the decision below are of sufficient importance to be reviewed by this Court, has filed a lengthy and unpersuasive brief on the merits. Indeed, CBS implicitly concedes the importance of the questions raised.

It does so by devoting the bulk of its brief to espousing a new theory of price fixing so unlimited in scope as to make virtually any cooperative or joint economic activity with any impact on price illegal *per se*. CBS contends that this extraordinary theory is commanded by decisions of this Court.

CBS also concedes that the Second Circuit's creation of a "market necessity" defense to illegal price fixing is worthy of review by this Court, but, says CBS, not in this case.

CBS, although conceding that the rationale of the decision below is incompatible with the Ninth Circuit's decision in *K-91*, sees no need for this Court to resolve the conflict.

Finally, CBS has not even tried to refute the showing made in the petition and supporting amicus briefs that the decision below threatens an important source of income of thousands of creators of music.

A decision which threatens thousands of creators, revolutionizes an industry, announces a new theory of price fixing and a new defense to price fixing, and conflicts with another Circuit's decisions should be reviewed by this Court.

I

The principal argument made by CBS is that the decision below is not worthy of review because the blanket license

> "presents as clear a case of illegality under Section 1 [of the Sherman Act] as could possibly be conceived." (CBS Br., p. 7).

Using even stronger language, CBS asserts:

> "We are dealing with an express, written agreement for the creation of a price-fixing mechanism as blatant and pervasive as any ever conceived." (CBS Br., p. 36).

CBS can make these claims only by ignoring history, the undisturbed findings of fact by the District Court and the pertinent legal authorities.

For example, contrary to CBS' suggestions on pages 8-9 of its brief: (a) ASCAP was not formed to fix prices; and (b) ASCAP does not either "determine" prices or arrive at its offers of license fees by dividing past aggregate payments of a licensee by the number of performances given by that licensee. CBS' brief distorts history and the trial record.

ASCAP was organized in 1914 to stop piracy, not to fix prices. ASCAP was an effort to find an effective way to solve the problems of creators of music, who were entitled to payment for the numerous and widespread performances of their works, and users of music who wished to perform musical compositions without infringing and without having to locate and negotiate with numerous copyright owners.

CBS, from 1929 until it brought this lawsuit, was a willing and active participant in the system it now claims is illegal.

Methods for arriving at reasonable license fees for an ASCAP license, by negotiation or by the District Court if negotiation fails, are regulated by the Amended Final Judgment in *United States* v. *ASCAP*. If those methods are a scheme which is "as clear a case of illegality . . . as could possibly be conceived," the Department of Justice has been an architect of and party to that "illegal scheme."*

---

* The "blatant" illegality of ASCAP's activities in conformity with the provisions of the Amended Final Judgment went unnoticed by Judge Friendly in *United States* v. *ASCAP* (Shenandoah Valley Broadcasting, Inc.) 331 F.2d 117, 121 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964), when he wrote:

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before.

(footnote continued on next page)

Throughout the world, societies similar to ASCAP offer blanket licenses to users. This worldwide acceptance of blanket licenses argues for their convenience and usefulness and against CBS' claims of the "blatant" illegality of that form of license.

CBS' extravagant arguments cannot even be reconciled with the majority opinion below. After condemning the blanket license as price fixing, the majority, recognizing the utility of the blanket license, wrote (App. A, p. 22a):

> "The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others."

These words scarcely describe a "price-fixing mechanism as blatant and pervasive as any ever conceived."

And, finally, there are the undisturbed findings of fact that ASCAP's members *would* deal directly with CBS and *would* compete on a price basis, if CBS were to ask. Given these findings, it is wrong to slap the label "price fixers"

The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)."

on individual sellers who are *willing* and *free* to negotiate individual prices for their individual products in individual negotiations, simply because they simultaneously offer the convenience of a blanket license to those users who request it.

The universal use of the blanket license; the unwillingness of the majority below to place an absolute ban on the blanket license; the District Court's undisturbed findings that ASCAP's members are willing to deal directly with CBS, contrary to the majority's assumption that they would be "disinclined" to deal with CBS; and the fact that the decision below is an unprecedented interpretation, at once an expansion and a contraction, of this Court's price-fixing decisions all support plenary review.

II

In amplification of its claims concerning the "blatant" illegality of the blanket license, CBS argues that the ASCAP system is no more than an extension of the "garden-variety price-fixing conspiracy" that would exist if music publishers agreed among themselves, or appointed a committee, to sell music performance rights for $1,000 a use (CBS Br., p. 8).

But the plain fact is that ASCAP's members have not agreed among themselves on a single per-use price to be charged for their separate compositions. All they have done is agree to license collectively those users of music in bulk who wish to obtain ASCAP licenses.

Moreover, an ASCAP license is distinct and different from the product individual members of ASCAP could offer. The blanket license gives the user maximum flexibility and convenience in its use of music. When the user

takes that form of license, among other benefits which no individual member could offer, the user obtains music performance rights for *all* the existing compositions in the ASCAP repertory, for *all* compositions that may thereafter be created by every ASCAP member during the term of the license, and also for compositions of tens of thousands of members of foreign societies.

Viewed in this fashion, the decision below was not "clearly correct" nor was it mandated by prior decisions of this Court. Rather, the majority, by engaging in antitrust theorizing and ignoring the economic realities with which the District Court dealt, has placed in jeopardy any form of economic integration where two or more sellers sell their products jointly under circumstances in which the venture has no demonstrable anticompetitive impact and, indeed, provides a useful and convenient service.

CBS seeks to justify the decision below by asserting that it is difficult to imagine how any common selling agency which establishes package prices could be lawful (CBS Br., p. 29). CBS sees no reason for this Court to review a decision which condemns as *per se* illegal a whole range of economic activities. Prior decisions of this Court suggest a more rational approach: application of the Rule of Reason to the activities of common selling agencies.

The Rule of Reason was applied by the District Court. After a detailed study of the music industry, Judge Lasker found that the blanket license was not an impediment to price competition among ASCAP's members.

CBS' brief in this Court ignores the trial below—indeed, CBS writes as if it had prevailed on the facts in the District Court (*see, e.g.*, CBS Br., p. 25 fn. ". . . CBS also maintained, and, we believe, overwhelmingly established . . . .").

The central fallacy in the CBS brief (and in the decision below) is the assumption—contrary to undisturbed findings by the District Court—of an "economic axiom" that the blanket license has an "anticompetitive effect" and that "this [economic axiom] is not [even] a proposition which must be proven" (CBS Br., p. 13).

We respectfully submit that it is contrary to teachings of this Court to apply *per se* rules of illegality on the basis of so-called economic axioms after an "elaborate study of the industry" at trial has established that the "nature and necessary effect [of the blanket license is not] plainly anticompetitive"—indeed, that the blanket license has no impact on competition for a user such as CBS which may deal directly with ASCAP's members. *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1365 (1978). Yet, that was the process the majority below followed and which CBS seeks to justify.*

III

Although CBS concedes that "there is certainly a conflict in the reasoning" of the *K-91* decision and the decision below (CBS Br., p. 33), it argues that the conflict should not concern this Court because:

---

* Judge Lasker, after an eight-week trial, found (App. B, p. 115a):

> ". . . CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

The majority below, without overturning any findings of the trial court, wrote (App. A, p. 22a):

> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete."

The concurring judge, however, characterized this statement of the majority as an "assumption," thus far unsupported by the proof as he saw it (App. D, p. 125a).

(a) the reasoning of *K-91* is "self-evidently absurd" (CBS Br., p. 34);

(b) the *K-91* reasoning was undercut by the Solicitor General's amicus brief (*id.*); and

(c) the conflict is not of the sort

> "that generates uncertainties having a widespread and significant effect on important areas of conduct" (*id.*).

As we have shown in the petition, however, the conflict between circuits and its effect "on important areas of conduct" may not be so easily dismissed.

This Court should decide whether the reasoning of a Circuit Court of Appeals that ASCAP and its members, acting in conformity with the provisions of a Government consent decree, were not a price-fixing conspiracy was "absurd."

And, as to the Solicitor General's brief, there is simply no basis to conclude that the Government in 1968 was announcing its adherence to the novel proposition that illegal price fixing could be saved by a "market-functioning-necessity excuse" (CBS Br. p. 34). If there be any doubt, the Solicitor General's views should be obtained.

In these circumstances, this Court's denial of certiorari in *K-91*—thus letting stand a decision which, in CBS' view, was not only "absurd," but sanctioned a blatantly illegal price-fixing scheme which could be used by every industry in this country—is of more than routine interest.

Finally, as to the impact of the conflict, we have already shown the sure turmoil the decision below will cause in the music licensing world—a world consisting of thousands of creators of music, both in this country and abroad and an even larger number of users, ranging from three television networks to the local taverns. Apart from the instances cited in our petition (p. 19),* since the date of its filing we have learned of users of ASCAP music in the general licensee category (restaurants, taverns, nightclubs, *etc.*) who are relying on the decision below to avoid any payment for copyrighted music.

The time for review is now—not years from now after federal courts all over the country have been inundated with plenary lawsuits, and counterclaims in infringement actions in which users assert that the unavailability of an ASCAP "per use" license devised to meet their particular needs entitles them to use copyrighted music for nothing.**

IV

As to the Second Circuit's espousal of a "market necessity" exception to illegal price-fixing, CBS concedes that the grant of certiorari might be provident in a case

* In two cases, broadcasters have asserted they are entitled to special licenses because the ASCAP blanket license violates the antitrust laws. *Lerner* v. *Spanish International Communications Corp.*, 76 Civ. 4518 (S.D.N.Y.) (local television stations); *Alton Rainbow Corp.* v. *ASCAP*, 78 Civ. 352 (S.D.N.Y.) (local radio stations).

** CBS' Brief in Opposition describes in much detail the features of a "per use" license it proposes for itself (CBS Br., pp. 36-37 fn.). The problems with this description are too numerous to be dealt with here. We are content to point out, however, that under the CBS per-use proposal, unlike the present ASCAP system, the ASCAP members would appoint a "Committee" to make sales at a specified fee for each use, the only difference in fees depending upon the nature of the use (*e.g.*, feature, theme or background). Hence, the CBS per-use scheme is precisely the type of arrangement which CBS describes on page 8 of its brief as price-fixing "beyond peradventure." We are unaware of any doctrinal support for the proposition that, in the guise of remedying one price-fixing arrangement, the courts may decree a different price-fixing arrangement.

whose outcome depended on the existence of a "market necessity" for price fixing. But, says CBS, "this is plainly not such a case" (CBS Br., pp. 26-27).

We disagree and suggest that what is plain is that the "market necessity" exception was central to the reasoning of the majority and, thus, to the result. The "market necessity" exception, while it allowed the majority below to escape a total condemnation of the blanket license and to "harmonize" its result, if not its reasoning, with *K-91*, is bound to create the likelihood of confusion and needless litigation over the availability of such a defense in price-fixing cases.

Conclusion

The importance of the questions presented is shown by the petition, the briefs of amici and even by CBS' brief. The questions concern not only the creators of the world's music but all who engage in cooperative business activities. The petition for a writ of certiorari should be granted.

August 16, 1978

Respectfully submitted,

Jay Topkis
Bernard Korman
Attorneys for Petitioners
American Society of Composers, Authors and Publishers, et al.

Of Counsel:
Allan Blumstein
Max Gitter
Paul, Weiss, Rifkind, Wharton & Garrison

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF

JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners American Society of Composers, Authors and Publishers, et al.

Of Counsel:

ALLAN BLUMSTEIN
MAX GITTER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, New York

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF

We submit this supplemental brief under Rule 24(5) to bring to the Court's attention a new development which, we submit, lends further support to our petition for a writ of certiorari.

One of the points we made in our petition is that review of the decision below is necessary now to avoid turmoil in the music licensing industry and a heavy burden on the federal courts which will result if the Second Circuit's decision is allowed to stand. We stated at page 19:

> "Under the Second Circuit's ruling here, however, a plethora of litigation seems inevitable. Even though

the Second Circuit decision is directed only to television networks, every user of ASCAP music will be encouraged to assert—in a plenary anti-trust action whenever and wherever he chooses—that the federal court he chooses must devise a 'per use' license for him and that he need pay nothing for what he has freely used.

"This is no exercise in speculation. Such claims have already been asserted by local television and radio stations asserting their entitlement to special licenses because the ASCAP blanket license violates the antitrust laws."

When we wrote the above passage, we referred to a few local television and radio stations which had asserted such claims. Now, however, our prophecy has become fact: the entire local television industry has threatened an antitrust action based on the decision below. On September 13, 1978, ASCAP received a letter from the All-Industry Television Music License Committee representing some 600 of the nation's 700 local television stations. That letter, a copy of which is annexed hereto, states in part:

"The ruling of the court in the *CBS* case, affirming the holding of many other courts that the existing blanket license is *per se* illegal, in our judgment conclusively compels exploration of alternative license forms.

* * *

"You should appreciate the fact that, in light of these precedents, stations are seriously considering pursuit of antitrust litigation seeking injunctive relief; prior to the commencement of any such litigation, however, we would be willing to pursue discussions of new license forms."

Thus, unless the decision of the Second Circuit is now reviewed by this Court, the industry-wide litigation threatened by the local stations is likely to be instituted, and another District Court will have to consider and apply the novel rule of price-fixing announced by the Court of Appeals in the decision below. The turmoil we predicted will have grown to embrace the largest single source of income for composers, the entire television industry.

September 21, 1978

Respectfully submitted,

Jay Topkis
Bernard Korman
Attorneys for Petitioners
American Society of Composers, Authors and Publishers, et al.

Of Counsel:
Allan Blumstein
Max Gitter
Paul, Weiss, Rifkind, Wharton & Garrison

ALL-INDUSTRY TELEVISION STATION MUSIC
LICENSE COMMITTEE
26 Broadway, New York, N. Y. 10004

BY HAND

Suite 1400
212-422-8180

September 13, 1978

American Society of Composers,
Authors & Publishers
One Lincoln Plaza
New York, New York 10023

Gentlemen:

The All Industry Television Music License Committee hereby requests, without waiving rights on the part of any station, a further extension of the existing licenses between ASCAP and the local television stations which the Committee represents to and including November 30, 1978, subject to retroactive adjustment as of January 1, 1978.

The ruling of the court in the *CBS* case, affirming the holding of many other courts that the existing blanket license is *per se* illegal, in our judgment conclusively compels exploration of alternative license forms. Similarly, we view the *Alden-Rochelle* v. *ASCAP* precedent as controlling authority for the stations' entitlement to a license from ASCAP which excludes from its coverage non-network pre-recorded programming.

You should appreciate the fact that, in light of these precedents, stations are seriously considering pursuit of antitrust litigation seeking injunctive relief; prior to the commencement of any such litigation, however, we would be willing to pursue discussions of new license forms. In light of the precedents, we would expect ASCAP to be willing to entertain such discussions.

We look forward to your prompt response.

Sincerely,

/s/ Leslie G. Arries, Jr.

Leslie G. Arries, Jr.
Chairman

LGA:lw

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners American Society of Composers, Authors and Publishers, et al.

Of Counsel:

SIMON H. RIFKIND
HERMAN FINKELSTEIN
ALLAN BLUMSTEIN
MAX GITTER
RICHARD H. REIMER
FRED D. HEATHER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

American Society of Composers, Authors and Publishers, *et al.*,
Petitioners,

v.

Columbia Broadcasting System, Inc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and concurring opinions of the United States Court of Appeals for the Second Circuit, reported at 562 F.2d 130, appear as Appendix A to the petition for a writ of certiorari. The opinion of the concurring judge on a petition for rehearing, not officially reported, appears as Appendix D to the petition. The opinion of the United

States District Court for the Southern District of New York (Lasker, J.), reported at 400 F. Supp. 737, appears as Appendix B to the petition.

JURISDICTION

The judgment of the Court of Appeals, Appendix C to the petition, was entered on August 8, 1977. A timely petition for a writ of certiorari was filed, and this Court granted the writ on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337 and 1338(a).

QUESTIONS PRESENTED

The American Society of Composers, Authors and Publishers ("ASCAP"),* is an unincorporated membership association of composers, lyricists and publishers of copyrighted musical compositions. For 64 years, it has offered the "blanket" license to all those who wished to perform the music created by ASCAP's members—a "blanket" license being one by which the licensee, for a stated term and royalty, is authorized to perform any copyrighted work that ASCAP has the right to license. This same blanket license is offered by music performance rights societies in all nations of the world which recognize copyright. Since 1941, ASCAP has been required to offer such licenses by consent decrees with the Department of Justice in

* This brief is filed on behalf of ASCAP and the individual writer and publisher members of ASCAP who were named as defendants in the complaint filed in the District Court.

United States v. *ASCAP*, an antitrust case in the Southern District of New York.

At the same time, however, ASCAP's members are totally free to license their individual copyrights to CBS or any other individual user in individual negotiations, if asked. They are not only free, they are willing—they would, the District Court found, "line up at CBS's door" if only CBS expressed an interest (Pet. App. B, p. 85a*).

Nevertheless, the Court of Appeals for the Second Circuit, reversing a decision of the District Court, has held in this action:

(a) that the blanket license constitutes "price-fixing" and hence is *per se* illegal under Section 1 of the Sherman Act; and

(b) that ASCAP's members misused their copyrights merely by offering an ASCAP blanket license to CBS for its television network.

The Court of Appeals reached this result, we submit, only by expanding the *per se* doctrine far beyond the bounds sanctioned by this Court. It held the blanket license *per se* illegal after an eight-week trial had indisputably demonstrated that the blanket license is a reasonable accom-

* "Pet. App." citations refer to pages of petitioners' appendices to the petition for a writ of certiorari. "A." citations refer to the volumes and pages of the appendix to the briefs filed pursuant to the Court's order of November 6, 1978.

modation of the needs of copyright proprietors and television networks—and does not unreasonably restrain trade.

The questions presented are:

1. When individual sellers are willing and free to negotiate individual prices for their individual products in individual negotiations, does their simultaneous offer of a package of all of their products through a common sales agent at a negotiated price constitute "price-fixing" which is *per se* violative of Section 1 of the Sherman Act?

2. More particularly, even though ASCAP's members were willing and free to license their copyrights to the CBS television network in individual negotiations, if asked, did ASCAP and its members engage in "price-fixing," illegal *per se*, and did they misuse the members' copyrights, by offering CBS an ASCAP blanket license?

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

STATEMENT OF THE CASE

The Parties

CBS

This case was brought by CBS on behalf of its television network. Operation of that network—which supplies programs to some 200 local television stations—is not, of course, CBS' only activity. CBS owns local television stations in five principal markets—New York, Los Angeles, Philadelphia, Chicago and St. Louis. It owns fourteen local radio stations in major cities, and its radio network has affiliation agreements with approximately 250 local radio stations. CBS Records is the largest manufacturer and seller of records and tapes in the world. CBS is a leading music publisher; indeed, it has publisher subsidiaries which belong to ASCAP and Broadcast Music, Inc. ("BMI") (the other major American performing rights licensor, petitioner in No. 77-1578). As the District Court found, CBS is the "No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music" (Pet. App. B, pp. 27a-28a, 90a, 93a; Court Exhibit ("CX") 2, 20A. pp. E1-E10; 8A. p. 1792).

Such is the agglomeration of economic power which

here casts itself in the role of victim.

ASCAP

ASCAP is an unincorporated association of creators and publishers of music (CX 2, 20A. p. E4; 8A. p. 1792).

Prior to the organization of ASCAP in 1914, there was no effective method by which individual writers and publishers of music in the United States could obtain payment for the performance of their copyrighted works. The users of music—in 1914 principally theaters, dance halls, restaurants and taverns—were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher could either negotiate licenses with the users or detect unauthorized uses and secure redress. Equally, users who wished to perform a great many compositions without infringing had no practical means of obtaining lisenses from the copyright proprietors (Pet. App. B, pp. 25a-26a).

ASCAP was organized as a means of bringing copyright proprietors and users together, to serve as a kind of clearinghouse for the licensing of music performance rights (*Id.*).

The music world has changed drastically since 1914. Broadcasters—radio and television stations and networks—are today the largest users of music. As these new users have come along, ASCAP has offered its members' works to them—while continuing to license the more traditional users (Pet. App. B, p. 26a).

ASCAP today has 16,000 writer and 6,000 publisher members (*Id.*); it licenses also on behalf of the hundreds of

thousands of members of some 30 affiliated foreign societies. The affiliated foreign societies license for ASCAP members in their countries (CX 2, 20A. p. E4; 8A. p. 1792).

ASCAP's members include Samuel Barber, Leonard Bernstein, Aaron Copland and Morton Gould among serious composers, and such popular composers and lyricists as Irving Berlin, Hoagy Carmichael, John Denver, Bob Dylan, Roberta Flack, Carole King, Richard Rodgers, Carly Simon and Stevie Wonder. And it represents the estates of deceased members, among them Bela Bartok, George M. Cohan, Duke Ellington, W.C. Handy, Oscar Hammerstein II, Victor Herbert, Cole Porter and John Philip Sousa.

The conditioning circumstance of ASCAP's existence today is the Amended Final Judgment entered on consent in 1950 in *United States* v. *ASCAP,* [1950-51] Trade Cas. (CCH) ¶62,595 (S.D.N.Y. 1950) (amending a 1941 consent judgment). That judgment controls virtually every aspect of ASCAP's internal and external operation.

Under the Amended Final Judgment and the ASCAP Articles of Association and membership agreements:

(a) membership in ASCAP is open to any writer of one published song and to any music publisher; hence, all writers and publishers are guaranteed access to the markets where music is licensed;

(b) each member grants to ASCAP only the *nonexclusive* right to license public performance of compositions

created or published during the term of membership; the right arises at the instant of creation or publication;

(c) the member retains the right to license directly, and ASCAP is forbidden to interfere with that right;

(d) no user may be denied an ASCAP license—indeed, a user obtains an ASCAP license by the very act of applying for one; and

(e) ASCAP is required to offer users the "blanket" license, which gives the user the right to perform all of the compositions in the ASCAP repertory, as often as desired, upon payment of one fee (Pet. App. B, pp. 29a-32a; CX 2, Ex. 9, 20A. pp. E84-E88; 8A. p. 1792; CX 2, Ex. 10, 20A. pp. E124-E138; 8A. p. 1792).

Blanket licenses are used throughout the world by performance rights societies in all countries which recognize copyright. The prime virtues of the blanket license are convenience, unlimited choice of compositions in the repertory, and freedom from concern about infringement. Users have unlimited access to all the copyrighted compositions written by members of the licensing society and of affiliated foreign societies—without the need to seek licenses from individual copyright owners (Pet. App. B, p. 26a).

The Amended Final Judgment requires ASCAP also to offer broadcasters a variant of the blanket license, the "per program" license. Here, too, the broadcaster has unlimited access to the ASCAP repertory but, instead of paying one fee for the entire license period, the per program licensee

pays a fee only for each program in which ASCAP music is performed* (Pet. App. B, pp. 29a-30a).

ASCAP's fees for all of its licenses are regulated by the Amended Final Judgment: if a user is dissatisfied with a fee quoted by ASCAP and an agreement can not be negotiated, the user has the right to have the District Court for the Southern District of New York determine a "reasonable fee." In any such proceeding, ASCAP—not the user—bears the burden of proving the reasonableness of the fee it requests (*Id.*).

ASCAP is in essence a cooperative. After deducting its operating expenses, it distributes all revenues among its members and affiliated foreign societies (Pet. App. B, p. 27a). Distribution arrangements comply with the mandate of the Amended Final Judgment that ASCAP

> "distribute to its members the monies received . . . on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP." (CX 2, Ex. 10 ¶XI, 20A. pp. E133-E134; 8A. p. 1792).

Thus, members receive royalty distributions only when

---

* As a matter of precise fact, the Amended Final Judgment requires ASCAP to issue only a per program license; ASCAP is "enjoined" from issuing a blanket license unless the broadcaster so requests (Pet. App. A, p. 7a).

Hence, CBS and every other broadcaster which has taken an ASCAP blanket license has done so only as a result of its own voluntary act, to satisfy its own preference.

their compositions are performed. There is no reward for the non-productive or the inefficient.

ASCAP is governed by a board of 24 directors, half elected by the writers, half by the publishers (9A. pp. 2411-12).

To sum up: the present ASCAP system for licensing music performing rights, as governed by the Amended Final Judgment

—guarantees that each broadcaster or artist wishing to perform ASCAP music may do so (and guarantees, accordingly, that the public may hear that music);

—guarantees that the user may obtain judicial determination of the reasonableness of the fee he shall pay, if he can not negotiate a satisfacory fee with ASCAP;

—guarantees the right of users to negotiate individual prices directly with copyright proprietors; and

—guarantees to the creators of music the opportunity to be rewarded in accordance with the use of their works.

BMI

BMI is a nonprofit corporation organized in 1939 by the radio broadcasting industry, including CBS, to act as a music copyright licensor. It is not a cooperative as is ASCAP—its stock is owned entirely by broadcasters (although CBS sold its shares back to the corporation in 1959). It has approximately 20,000 writer and 10,000 publisher affiliates and, according to the District Court's calculations, a repertory of over one million compositions as compared with ASCAP's over three million (Pet. App. B, p. 27a).

BMI, too, operates under an antitrust consent decree, the particulars of which we may leave for discussion by BMI (Pet. App. B, p. 32a).

As a practical matter, the trial court found, virtually every copyrighted composition is in the repertory of either ASCAP or BMI (Pet. App. B, p. 27a). In consequence, a broadcaster or other user holding blanket licenses from both organizations may freely perform whatever music his taste and interests may suggest.

Since CBS here contends that the blanket license is *per se* unlawful, it may be noted that, when CBS and the other broadcasters established BMI in 1939, they agreed to take blanket licenses from it (Pet. App. B, p. 51a).

Relations between the Parties

CBS and ASCAP have dealt with each other for almost half a century—beginning in 1929 when CBS took an ASCAP blanket license for a radio station (Pet. App. B, p. 51a). When the CBS radio network was established, it sought and obtained an ASCAP blanket license (13A. p. 3610).

CBS first took an ASCAP blanket license for its television network in 1946 (Pet. App. B, p. 51a). In 1949, when television began to show signs of serious commercial significance, the broadcasting industry, including CBS, *in-*

sisted that ASCAP continue to offer the blanket license (13A. p. 3610).

Although, as we noted earlier, the Amended Final Judgment requires ASCAP to offer broadcasters a per program license, and bars offering of a blanket license unless the broadcaster requests one, CBS has always sought and obtained blanket licenses for all of its operations, never a per program license. Nor has the District Court ever been required to set a fee for an ASCAP-CBS license of any kind—the parties were always able to negotiate satisfactory terms (Pet. App. B, p. 51a).

CBS purports to find evil in the fact that, under the blanket license, the fee does not vary with the licensee's use of music. This is of course true: it is the essence of the blanket license that the licensee pays a set fee for unlimited *access*, and may perform ASCAP music as often as he wishes without variance in the fee. This is the arrangement the licensee chooses when he opts for the blanket license in preference to per program or direct licensing. It is true also, however, as the trial court found, that

> "the only evidence on the point indicates that the extent of CBS' music usage has always been a significant factor in negotiations for the fee paid in renewals of CBS' blanket license" (Pet. App. B, p. 115a n.22).

Such was the history of relations between the parties as of December 31, 1969, when the CBS television network blanket license came to an end. On that date, CBS filed the present action in which it demands an injunction requiring ASCAP to offer something never used in music licensing anywhere in the world and never even reduced to

writing, the so-called "per use" license (Pet. App. B, pp. 24a-25a).

CBS' action was, to say the least, somewhat abrupt. As the District Court found—and let us here note that the Court of Appeals accepted the District Court's findings in their entirety and commended Judge Lasker for their clarity (Pet. App. A, p. 2a)—"Neither the history of the relationship between the parties nor the events leading to this action remotely suggest that CBS has been compelled to take a blanket license it did not want" (Pet. App. B, p. 53a). And "CBS has made no effort to obtain the kinds of licenses it now complains defendants are unwilling to grant" (Pet. App. B, pp. 50a-51a).

Rather, the fact was that a new vice president, Donald Sipes, arrived on the scene at CBS in 1969; he was, said the District Court, "almost completely unacquainted with the intricacies of music licensing" (Pet. App. B, pp. 53a-54a). Sipes testified that he disliked the blanket license as soon as he saw it; he quickly decided to explore alternatives. He consulted only one man who had the slightest familiarity with music, one Poklitar, who was in charge of clerical personnel processing music logs. Said the District Court kindly, "Poklitar is not a business man and his duties involve a narrow portion of the music licensing spectrum" (Pet. App. B, p. 54a).

Neither Sipes nor anyone else at CBS spoke with any copyright owner, any television program producer or anyone else who might possibly know something about the

realities of music licensing. Sipes did not even discuss the subject with any other CBS executive (Pet. App. B, p. 54a).

Sipes did not testify that ASCAP ever refused to discuss any particular form of license. Neither Sipes nor anyone else at CBS ever attempted to obtain a license from an ASCAP member in direct negotiation (Pet. App. B, p. 80a) —Sipes never so much as talked with a composer, a lyricist or a publisher (Pet. App. B, pp. 81a-82a). CBS made no feasibility study of whether it could supply its music needs through direct licensing; it never studied what a "per use" license might look like, whether it could possibly work, or whether a blanket license might be preferable (Pet. App. B, p. 54a).

What Sipes did was to talk to two CBS in-house lawyers, and he discussed only legal matters with them, not business reality (Pet. App. B, p. 54a). Without further ado, CBS filed this action.

As the District Court said (Pet. App. B, p. 112a):

> "We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem."*

---

* CBS continues to rely on legal solutions to business problems: After the Court of Appeals rendered its decision in this case, CBS cancelled its license under the Amended Final Judgment, it has made no payment whatsoever to ASCAP, and it continues constantly to perform ASCAP music.

Proceedings Below

The District Court

The complaint filed by CBS tracked and relied heavily on this Court's then-recent decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). CBS alleged that ASCAP and BMI had violated the antitrust laws because the licenses available from both licensing organizations "compel[led]" the CBS television network to pay for music it did not want and because each licensing organization was "using the leverage inherent in its copyright pool to insist that [CBS] pay royalties on a basis which does not bear any relationship to the amount of music performed." (Pet. App. B, p. 33a).

By way of relief, the complaint sought an injunction requiring each licensing organization to grant the CBS television network a "per use" form of license (Pet. App. B, p. 25a).

Thus, the essential claim tendered by CBS was that it was *compelled* to deal with ASCAP. But, as we have seen, the licensing rights which ASCAP obtains from its members are nonexclusive. Therefore, in theory, at least, neither the CBS television network nor any other user is compelled to deal with ASCAP: any user may ignore ASCAP and negotiate licenses with the members.

In consequence, the principal issue tried before the District Court was whether CBS, as a practical matter, could

obtain the licenses it desired directly from ASCAP's members. Although CBS had never approached even one ASCAP member for a direct license, it sought to prove that any such effort would be futile—ASCAP members would refuse to license directly. That being so, said CBS, the blanket license should be condemned as block-booking and price-fixing.

The outcome of the trial is not in dispute: the evidence destroyed CBS' factual contentions. After eight weeks of trial at which the industry was studied in every detail, undisturbed findings of fact by the District Court established that CBS *could* acquire the licenses it wished in direct negotiation with ASCAP members, and that ASCAP's members *would* compete on a price basis for individual compositions if CBS would only ask.*

Judge Lasker's findings were explicit (Pet. App. B, pp. 111a-112a, 115a, 117a, 119a-120a):

> "CBS has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.
>
> * * *
>
> "CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.
>
> * * *
>
> "CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license.
>
> * * *
>
> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses . . . [C]ertainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place."

* CBS tried and tried to prove that copyright owners would refuse or would at least be "disinclined" to give direct licenses to the network. No credible proof was forthcoming. Only one witness testified that a publisher for whom he worked would probably refuse to grant licenses to CBS. And that testimony is incredible rather than persuasive: the witness worked for publishers *owned by CBS* (Pet. App. B. p. 90a). The District Court, by contrast, relied on such testimony as this by publisher Edwin H. Morris (Pet. App. B, pp. 85a-86a):

> "Q. Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?
>
> "A. Yes.
>
> "Q. Do you invite them to come into your office?
>
> "A. I will even go to theirs."

Each of these findings was preceded by an extensive discussion of the testimonial and documentary evidence which supported it, including a lengthy analysis of the fashion in which CBS used music and the methods by which CBS could license this music directly from copyright proprietors. In addition, the District Court, in painstaking detail, discussed the evidence relating to alleged "obstacles" to direct licensing suggested by CBS—and rejected

all claims that there were any such "obstacles" (Pet. App. B, pp. 61a-79a, 111a-112a).

Since none of the District Court's findings was disturbed on appeal, we need not discuss the evidence.

Turning to the legal issues, the District Court wrote (Pet. App. B, p. 40a):

> "In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., United States v. Socony Vacuum Oil Co., Inc., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis."
>
> "The claim fails as a matter of law."

The District Court's conclusion that CBS' claim failed "as a matter of law" was premised on its reading of two decisions of this Court, *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950); and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S.

100 (1969). To the District Court, these cases teach that "[T]he critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor" (Pet. App. B, p. 43a).

Since there was no compulsion in the blanket license which ASCAP made available to CBS on its own request, since CBS had a free and real choice between dealing with ASCAP and dealing with the individual members, the District Court dismissed the complaint.

The Court of Appeals

The Court of Appeals accepted every finding of fact made by the District Court in its 46-page opinion. On the central issue tried by the District Court—whether CBS, if it so chose, could deal directly with ASCAP's members and obtain music performance rights without an ASCAP blanket license—the Court of Appeals concluded (Pet. App. A, p. 10a):

> "Suffice it to say that our review leads us to the conclusion that the essential finding of the District Court that such a market *can* exist is not clearly erroneous" (emphasis in original).

Given this proven absence of coercion, the Circuit Judges agreed with Judge Lasker that claims of illegal tie-in and block-booking had no merit (Pet. App. A, p. 11a).

But a majority of the Court of Appeals (Judge Gurfein and the late Judge Anderson) then held that the mere offering of a blanket license by ASCAP—even though ASCAP's members were willing to deal individually and though ASCAP was required to offer blanket licenses by

the Amended Final Judgment—was an act of "price-fixing" as a matter of law, and so illegal *per se*. (Judge Moore, in an opinion termed a concurrence, refused to agree that the blanket license was "price-fixing" [Pet. App. A, p. 23a].)

Disregarding the realities of the music business as revealed in the lengthy trial record and found by the trial court, the majority reached this conclusion (Pet. App. A, pp. 11a-12a):

> "The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition. His distributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).
>
> "There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his *own particular* composition, ..." (footnotes omitted) (emphasis in original).

The majority offered this further explanation (Pet. App. A, pp. 20a, 22a):

> "[T]he very availability of the blanket license itself involves the fixing of a collective price which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete.
>
> * * *
>
> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete" (emphasis in original).

In the interest of coherent presentation, we may perhaps interrupt at this point to suggest that, in ruling the blanket license *per se* illegal, the majority in the court below made two basic errors:

First, it ignored the many decisions of this Court holding that the legality of a joint selling agency is to be determined by the rule of reason—even when the participants do *not* stand ready to deal as individuals. The fact that a joint selling agency sells at a set price does not constitute "price-fixing" and *per se* illegality.

Second, the court below took as its touchstone the proposition that "the individual copyright owner . . . [may] *choose* the blanket license as his medium of licensing in preference to individual bargaining" (Pet. App. A, p. 20a) (emphasis in original). Were that true, the court might per-

haps have some theoretical support for its conclusion that "[t]he blanket license dulls his incentive to compete" (Pet. App. A, p. 20a) (although theory would still fall in the face of the District Court's findings that ASCAP members "would wait at CBS' door" and "compete with each other on a price basis" if only CBS would ask). But the precise opposite is true—it is the user, such as CBS, not the ASCAP member, who chooses whether to deal with ASCAP or the member. Only if CBS decides to approach ASCAP may ASCAP offer a blanket license. If CBS chooses to ignore ASCAP and approach the individual member, there is no way in the world that the member can "*choose* the blanket license as his medium of licensing in preference to individual bargaining."*

Having thus found price-fixing where price-fixing had never been seen before, and having extended the concept

* The court below made a third basic error if it meant to suggest that the blanket license "includes compensation even for those in the combination whose wares are not used" (Pet. App. A, p. 11a). Under the Amended Final Judgment, ASCAP's distributions are divided equally between publishers and writers. Publishers receive royalty distributions on the basis of performances only. Composers and lyricists have the right to elect to have distributions (a) based solely on performances, or (b) based on performances and additional factors, including the recognized status of their works, the member's average performances through the years and the number of years in which the member has had performances (*See* CX 2, Ex. 11, 1960 Amended Final Judgment, Section III(A) and Part I of Attachment A., 20A. pp. E143-E144, E156-E159; 8A. p. 1792. *See also* 9A. pp. 2481, 2512-20). Thus no ASCAP member receives a distribution if his works have not been performed.

It is perhaps worth noting that, under the weighting rules which ASCAP has adopted with the approval of the District Court administering the Amended Final Judgment, all performances do not earn the same credit. For example, the music director of a show such as the "Tonight" show or "Captain Kangaroo" is limited in the number of performance credits he may earn by performing his own works. And "serious" music is encouraged through a performance weighting system that rewards its composers more generously than composers of popular music. (CX 2, Ex. 11 and attachments thereto, 20A. pp. E139-E208; 8A. p. 1792; 9A. pp. 2481, 2515-20.)

of *per se* illegality beyond all prior bounds, the majority abruptly did an about-face and created a new defense to price-fixing. It ruled that a common selling agency with a single price might be saved from *per se* illegality by "market necessity." The court did not find it necessary to resolve the incongruity in traditional terms between *per se* illegality and "market necessity" justification: here, said the majority, there was no "market necessity" for the blanket license because, as the District Court found, direct dealing between CBS and ASCAP members was entirely feasible.

And so ASCAP and its members, by reason of their making the blanket license available to CBS, were guilty of price-fixing. Their problems did not end there: in a footnote, the court said: "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim" (Pet. App. A, p. 23a n.29).

This footnote would seem to pose the most deadly threat to the enforceability of the copyrights of ASCAP's 16,000 writer and 6,000 publisher members, and threaten also the copyrights of the 30 foreign societies which have licensed through ASCAP.*

The liability of ASCAP and its members thus resolved, the court did another turnabout. Instead of enjoining the *per se* illegal blanket license, the court said (Pet. App. A, pp. 22a-23a):

> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required

* CBS has advised ASCAP that, if it is sued for infringement of any ASCAP-licensed copyright, it will defend with a claim of "misuse."

to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.

"We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith" (footnotes omitted).

The *per se* illegal blanket license could, then, perhaps still be saved if the District Court could fashion "some form of per use" license to be issued by ASCAP. The Second Circuit did not explain why a per use license, with ASCAP setting the rates, would be any the less "price-fixing" than a blanket license—nor why, if the members set the rates, the per use license would offer anything more than, or different from, that which the individual members offer today in direct bargaining.

SUMMARY OF ARGUMENT

The court below erred in the following respects:

(a) it held to be "price-fixing" conduct which had never before been so perceived, announcing a theory so unlimited in scope as to make virtually any cooperative or joint economic activity with any impact on price illegal *per se*;

(b) it applied the label of *per se* illegality based on assumptions of fact contradicted by the undisturbed findings of the District Court;

(c) it set at naught the entire concept of *per se* illegality by creating a "market necessity" exception; and

(d) it directed the District Court to develop a "per use" license which shares whatever *per se* problems the blanket license may have.

ARGUMENT

I

ASCAP's BLANKET LICENSE IS NOT "PRICE-FIXING" AND IS NOT *PER SE* ILLEGAL

It has long been a fundamental tenet of the antitrust laws that *per se* rules are not matters of dogma, proclaimed by authority and accepted on faith. Rather, they come into being when experience and economic analysis combine to make it clear that the conduct under review is so harmful and so lacking in redeeming virtue that it should be categorically prohibited.

Ignoring such tests, making no such inquiry, the court below viewed ASCAP and all other common sales agencies as falling within the ban of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), that "[a]ny combination which tampers with price structures" is illegal *per se*.

ASCAP, we submit, does not tamper with price structures in any way. And even those common sales agencies which may fairly be said to restrict competition have always been judged by the rule of reason rather than being held *per se* illegal.

Socony-Vacuum

Socony-Vacuum involved, of course, a classic instance of price-fixing and price-tampering—a combination of gas

marketers who agreed to maintain prices by buying up gasoline which would put downward pressure on prices if it ever got to market.

Its facts could hardly be more remote from those with which we are involved here. Even if we focus on the bare quoted language, it is clear that *Socony-Vacuum* is of no pertinence—in making the blanket license available, ASCAP and its members do not tamper with price structure and do not engage in price-fixing. For it is the essence of price-fixing that the price-fixers "fix"—that they agree either (a) to observe the established prices and not to compete with each other in price terms, or (b) to engage in conduct, as in *Socony-Vacuum*, the purpose and necessary effect of which is to fix and maintain prices. ASCAP's members undertake no such commitment nor do they engage in any such conduct. As the District Court found, ASCAP was not organized to fix or maintain prices, it "was organized as a 'clearing house' for copyright owners and users" (Pet. App. B, p. 26a). Nor may it be said of the offering of a blanket license that its purpose and necessary effect are anticompetitive—not when (a) the blanket license may be offered only when the user so chooses; (b) CBS and all other users have so regularly sought its benefits; and (c) the District Court has found that ASCAP's members are quite willing to negotiate individual prices quite apart from the blanket license, if only CBS will ask them.

In reaching its result, the Second Circuit did not cite and seemingly did not consider this Court's teaching in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977), decided almost two months earlier:

> "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive."

Nor did the majority below mention the decision on which *Continental T.V.* drew for its delineation of the circumstances justifying *per se* treatment, *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958), which said:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

This test was reaffirmed last Term in *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1365 (1978), where the Court said that agreements may be held illegal *per se* only when their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."

Clearly, by these standards, the blanket license does not qualify for condemnation under *per se* rules. For not only is the blanket license not "plainly anticompetitive"—here, we have had an eight-week "elaborate study of the industry" which has resulted in the conclusion that, tested by the rule of reason, the use of the blanket license is lawful.

This careful study was, we may say, entirely appropriate and necessary for, as the Court of Appeals said, the music licensing business is like no other, it is "*sui generis*" (Pet. App. A, pp. 3a-4a). That very *sui generis* quality would seem to argue, however, that the courts should go

slow in developing new *per se* rules for application in this complex field.

Common Sales Agencies

The court below evidently regarded its ruling as having impact far beyond the music-licensing business. Said the court (Pet. App. A, p. 11a):

> "The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained."

But common sales and buying agencies and other arrangements among competitors which, by contrast with ASCAP's blanket license, really do affect or eliminate competition—*e.g.*, where members of a selling group do not sell individually—have regularly been held subject to the rule of reason, rather than *per se* illegal, and they have regularly been held lawful. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960); *United States* v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); In re *Associated Greeting Card Distributors*, 50 F.T.C. 631 (1954); *see* R. Bork, *The Antitrust Paradox* 263-7 (1978); L. Sullivan, *The Law of Antitrust* 207-8 (1977).

Ironically, one of the common selling and buying agencies threatened by the Second Circuit's ruling here is the

CBS television network itself. In functional terms, the network is a pool of approximately 200 affiliated local stations which sell their broadcasting facilities collectively through CBS. The network buys programs for these 200 station and sells advertising time for them. The network—not the individual station—acts as buyer and seller and negotiates the package fees. If ASCAP's blanket license is unlawful despite the members' willingness to negotiate individually, then equally unlawful are CBS' operation and the operation of the other national networks, despite the contractual freedom of the affiliated local stations to refuse a network program and to deal directly with an advertiser or a program supplier.

Automatic Radio and *Zenith*

The District Court here held that *Automatic Radio Manufacturing Co., Inc.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950); and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), read together, teach that package licensing agreements are lawful when made for the convenience of the parties, without coercion (Pet. App. B, pp. 40a et seq.).

The court below held these decisions inapposite. It claimed to find a distinguishing feature in the fact that "these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved"—by contrast with ASCAP, which licenses on behalf of its many members, who separately own their own copyrights (Pet. App. A, p. 17a).

This is a distinction without a real difference: surely Hazeltine, like any holder of hundreds of patents, must

have acquired them by assignment from the original inventors. Moreover, it would make no sense, economic or legal, to penalize ASCAP and its members for the fact that the members retain the right to license their copyrights individually.

Further, the attempted distinction would not apply to BMI, since BMI is an independent middleman in which writers and publishers play no management role—it is a "single trader," quite analogous to Hazeltine. It would be extraordinary indeed if, on this basis, BMI's licensing were to be held lawful and ASCAP's *per se* illegal—when BMI is totally owned by the broadcasting industry.

Let us consider still another demonstration of the illogic inherent in the attempted distinction of *Automatic Radio* and *Zenith.* We may envisage two ways in which a package of copyrights or patents may be licensed: the package license may be the only method of licensing, as was true in *Automatic Radio* and *Zenith.* Or it may be a nonexclusive method, with the user having the option to deal directly with the individual copyright proprietors, as is the case with ASCAP. Surely the nonexclusive basis, under which direct dealings are feasible, enhances competition. Yet the majority in the court below reached the opposite conclusion. It held that when the package license is simply a convenience, available to CBS if it chooses to follow that licensing route, the ASCAP license is *per se* illegal.

In our submission, the attempted distinction of *Automatic Radio* and *Zenith* fails—these cases make it clear, as the District Court here held, that the difference between

lawful and unlawful package licensing is coercion. And since ASCAP does not coerce, its blanket license is lawful.*

These cases are fatal also to the claim made here by CBS that there is something inherently bad in the fact that, under the ASCAP blanket license, the user pays for and receives the right to perform millions of compositions when he may use only hundreds or thousands—CBS often wails that it thus pays for music it does not use. In point of fact, of course, it is the right to choose for which CBS pays—CBS may no more complain than may one who goes to a smorgasbord restaurant and can't eat everything he can see. *Automatic Radio* and *Zenith* make this clear; there Hazeltine licensed over 500 patents and a typical user such as Zenith used only a handful, *see Hazeltine Research, Inc.* v. *Zenith Radio Corp.*, 388 F.2d 25, 33 (8th Cir. 1967), but a blanket license was held permissible provided there was no coercion.

K-91

The majority decision below is in direct conflict with *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968). There, ASCAP members sued a radio broadcaster for copyright infringement and won. Defendant argued that ASCAP was an unlawful price-fixer; the Ninth Circuit disagreed.

The Second Circuit, in the case at bar, said that it had no quarrel with the Ninth Circuit's "result" in *K-91*—

* The *Harvard Law Review* is in accord: "the district court was fundamentally correct in viewing the question as one of coercion, focusing on the viability of the direct licensing option for CBS." Note, *The Middleman as Price Fixer*, 91 Harv. L. Rev. 488, 495 n.39 (1977).

there was a "market necessity" for the blanket license in the case of the K-91 radio broadcaster, said the majority below, and so the "price-fixing" by ASCAP in the blanket license could be justified (Pet. App. A, p. 21a n.26).

But that is not the route which the Ninth Circuit took. The Ninth Circuit said, rather, that ASCAP did no "price-fixing": since the ASCAP offer of a blanket license was subject to judicial determination, under the Amended Final Judgment, of the reasonable fee for that license, ASCAP was not the "price-fixing authority." The Ninth Circuit wrote, 372 F.2d at 4:

> "ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority."

The Ninth Circuit held on still another score that ASCAP's conduct was lawful, 372 F.2d at 4:

> "There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

In commenting on *K-91*, the majority below ignored the second rationale of the Ninth Circuit, and said of the first that it did not think

> "that the determination of 'reasonableness' of the price by a *court* saves the price that has been fixed by a combination from continuing to be an unlawful device in restraint of trade, absent the justification of market necessity" (emphasis in original).

In espousing this view, however, the Second Circuit made two analytical errors:

First, it equated ASCAP's offer of a license fee in a rate-making proceeding under the Amended Final Judgment with the "fixing" of a price for an ASCAP license.

Second, it paid no heed to the findings of the District Court that ASCAP's blanket license does not restrain trade because of the willingness of ASCAP's members to deal directly.

As the Ninth Circuit pointed out in *K-91*, 372 F.2d at 4:

> "ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly."

• • •

There is no basis then, in either authority, logic or the evidence, to hold it illegal *per se* for ASCAP to offer a blanket license to the CBS television network. It is rather an act to be viewed by the light of reason; the District Court having found it to be reasonable, it is lawful.

II

THE "MARKET NECESSITY" EXCEPTION DESTROYS THE *PER SE* RULE AND THE "PER USE" LICENSE IS AS ILLEGAL AS THE BLANKET

Having taken *per se* illegality into areas entirely new, the majority below suddenly pulled back and decreed that there is a "market necessity" exception to the rule that price-fixing is *per se* illegal.

This is, we submit, a contradiction in terms: when we say that arrangements are *per se* illegal, we mean that we will hear no justification for them—neither the "market necessity" for a kind of license nor the "reasonableness" of a fixed price.

The court below apparently was driven to this logical inconsistency by two considerations. First, it had to recognize that in some circumstances—dance halls, restaurants, small radio stations such as K-91—individual direct licensing can not possibly take place and so the blanket license is indispensable.* Second, it doubtless desired to harmonize its decision with the views expressed by the Ninth

* As the court pointed out (Pet. App. A, p. 21a n.26): "Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations."

Circuit in *K-91* and by the Solicitor General when that case was before this Court on petition for certiorari. The Solicitor General then advised this Court of the Government's view that ASCAP's offering of a blanket license to a radio broadcaster was to be judged "in the light of economic realities," and was, in that light, reasonable. Memorandum of the United States as *Amicus Curiae* at 10-11 (No. 67-147, 1967 Term).

But if the blanket license is indispensable and so permissible in some circumstances, then, as the *Harvard Law Review* has pointed out, "it is not inherently harmful at all." Note, *The Middleman as Price Fixer,* 91 Harv. L.Rev. 488, 497 (1977). And that being so, it may not be termed illegal *per se.* Rather, it is to be tested by the rule of reason. Indeed, the creation of the "market necessity" exception is an admission that *per se* treatment is wholly inappropriate.

The Yale Law Journal perceived another problem in the "market necessity" exception. Said a Yale casenote, CBS v. ASCAP: *Performing Rights Societies and the Per Se Rule,* 87 Yale L.J. 783, 799 (1978):

> "The market function exception created in *CBS* threatens to swallow the per se rule. The exception to the per se rule would force the courts to examine the anatomy of the market in every case where the defense is raised, thus defeating the simplifying purpose of per se rules."

The majority below apparently recognized this problem and, in a footnote, sought to "narrow" the "market necessity" defense it was creating by saying (Pet. App. A, p. 16a n.22): "it is difficult even to imagine another in-

dustry where such a 'market necessity' defense would be applicable."

It may be difficult to imagine another industry, but it is not at all difficult to imagine hundreds of lawyers eager to assert that their clients' conduct is justified by "market necessity"—and to demand that the issue be tried.

As we have seen, the majority below, having held the television network blanket license *per se* illegal, and having held that no "market necessity" justification existed, still sought to preserve this much-maligned creature. The blanket license might exist, said the Court of Appeals, if only the District Court would fashion "some form of per use" license to be offered by ASCAP. The majority below did not indicate how this "per use" license would be any the less "price-fixing" than the blanket license. And CBS has resolved any uncertainty. In its brief in opposition to the petitions of ASCAP and BMI for certiorari, CBS noted that petitioners were contending that "the per-use system . . . would represent a 'classic' case of price-fixing." Said CBS candidly, "Of course that is true, and for precisely the same reasons that the present system is price-fixing . . . ." (Brief for the Respondent in Opposition at 37-8).

So to legitimatize one arrangement which is *per se* illegal, the majority below would create another price-fixing system which would be equally illegal.*

That the court below would go to such extremes to preserve the blanket license is, we submit, the conclusive demonstration that this form of license may not be deemed *per se* illegal.

* Query how the per use system to be created would solve the problems of past "misuse."

CONCLUSION

The decision below substitutes theory for contrary and carefully-adjudicated fact. On that basis, it proclaims a scope for the doctrine of *per se* illegality never before seen or even hinted at.

To avoid the problems thus threatening music licensing, the court below then causes even greater problems for antitrust enforcement and judicial administration by creating the "market necessity" defense.

If one were to grant the majority below its basic premise —that it is "price-fixing" for ASCAP to accede to the request of the CBS television network for a blanket license— what follows may have a certain inevitability.

We submit, however, that the proper course is to go back to the starting point: the ASCAP blanket license is not "price-fixing." If it is to be appraised at all in a court of law, it should be tested by the rule of reason. It has been so tested by the trial court and found to pass the test. The Court of Appeals did not disturb those findings.

We ask, in consequence, that the decision appealed from be reversed, and the order of the District Court dismissing the complaint be reinstated.

Respectfully submitted,

Jay Topkis
Bernard Korman
Attorneys for Petitioners
American Society of Composers, Authors and Publishers, et al.

Of Counsel:

Simon H. Rifkind
Herman Finkelstein
Allan Blumstein
Max Gitter
Richard H. Reimer
Fred D. Heather
Paul, Weiss, Rifkind, Wharton & Garrison

November 16, 1978

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners
American Society of Composers, Authors and Publishers, et al.

Of Counsel:

SIMON H. RIFKIND
HERMAN FINKELSTEIN
ALLAN BLUMSTEIN
MAX GITTER
RICHARD H. REIMER
FRED D. HEATHER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, New York

TABLE OF CONTENTS

Table of Authorities

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

Despite CBS' rather extended argument, this case is, we submit, quite simple:

CBS says it does not want an ASCAP blanket license; instead CBS says it wants a marketplace in which ASCAP's members, competing on a price basis, would license performance rights directly to CBS.

But the District Court found that CBS already has that marketplace: it could get all the licenses it needs directly from ASCAP's members, and the members would compete on a price basis, if asked.

Based on these and other extensive findings dealing with the structure and economics of both television and the music business, the trial court perceived no evil, no cognizable antitrust injury to CBS, and, hence, no violation of

the antitrust laws—not price-fixing, not tying, not boycotting and not monopolization.

The Court of Appeals did not disturb any of the findings of fact made by the District Court, nor did it take issue with any of Judge Lasker's legal conclusions, save for the one on price-fixing.

And so the central issue before this Court, as we articulated it in our petition for a writ of certiorari, is simply whether Section 1 of the Sherman Act condemns as "price-fixing" the offer of a package of products through a common sales agency, clearinghouse or joint venture, when any buyer may also obtain any one or more of those products by negotiating for them directly with the owner.

We shall discuss here in summary fashion a few of the errors we perceive in CBS' lengthy papers.

I.

CBS Is Not Entitled to a Trial *De Novo* in this Court

One constant error permeates CBS' brief—its unwillingness to recognize that findings of fact made by the District Court and left standing by the Court of Appeals (which means all of the District Court's findings) may not be re-litigated in this Court. *See, e.g., Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949) (this Court is not "a court for correction of errors in fact finding").

CBS' attempts to re-litigate the facts distort the legal issues before this Court. For example:

CBS now says that it agrees with the courts below that there is no "inherent" reason why CBS could not obtain all of the performance rights it needs via direct licenses from ASCAP's members (Brief for Respondent

at 35). But, argues CBS, there remain "artificial" and "cartel-created" barriers to achieving that result which can be removed only by judicial decree (Brief for Respondent at 121). Those barriers include what CBS describes as the lack of "transactional" machinery for direct licensing and "intense antagonism [by ASCAP members] to a competitive system" *e.g.*, Brief for Respondent at 79, 124.

The answer to the CBS position is that CBS sought to prove these assertions at trial—and failed. Thus, on the issue of "transactional" machinery, the District Court, after a painstaking review of the entire record, not just the snippets and excerpts contained in CBS' brief and addenda in this Court, concluded (Pet. App. 79a):

> "[T]he relevant question is whether the relatively modest machinery required [to enable CBS to engage in direct licensing] could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could."

And after a similar review of the entire record dealing with the alleged "intense antagonism" of ASCAP's members to direct licensing, the District Court made this finding (Pet. App. 112a):

> "The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur."

CBS' presentation is replete with numerous other examples of its efforts to obtain a trial *de novo* in this Court;

its 101 pages of addenda are only the most glaring example. When this material is excised from the CBS presentation, as it should be, we are left with the simple and readily determinable issues of law we have previously articulated.*

II.

ASCAP and Its Members Do Not Engage in Price-Fixing

The central fallacy in CBS' price-fixing argument is illustrated by a single sentence in its brief. According to CBS (Brief for Respondent at 54):

> "[ASCAP members] do so [fix prices] by agreeing to sell by committee, rather than by competing among themselves."

That statement is wrong as a matter of law. And it mischaracterizes the conduct of ASCAP's members.

---

* In its discussion of the facts, CBS is not entirely fair: thus, CBS repeatedly writes as though the trial court "found" that, because of mechanical difficulties in negotiating direct licenses, CBS could begin direct licensing only after "a long period of advance preparation" (Brief for Respondent at 46, 129, 148-49). What Judge Lasker said was (Pet. App. 65a-66a):

> "[T]here is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation. Accordingly, to presuppose, as CBS does, that the feasibility of the direct licensing alternative is to be judged literally as of 'tomorrow' miscasts the issue. The proper question, we believe, is whether such mechanical obstacles as exist could be remedied within a reasonable period prior to cancellation of the blanket license."

As we have seen, Judge Lasker found that "a reasonable planning period" would solve the problem (Pet. App. 79a).

Then there is CBS' extraordinary statement that "defendants have explicitly conceded that the purpose of blanket licensing is to foreclose competition and inflate price . . ." (Brief for Respondent at 74). We made no such concession.

If CBS were correct as a matter of law, any common sales agency, including the CBS television network, would be illegal *per se*.

No case supports such a result. CBS has cited none.

To be sure, some joint selling ventures have been found to violate the antitrust laws. Thus, in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), two newspapers formed a joint venture to sell in combination the same products (subscriptions and advertising space), which they had previously sold separately—and with the joint venture established, they refused to deal separately. This Court quite understandably held, in affirming summary judgment, 394 U.S. at 134:

> "The purpose of the agreement was to end any business or commercial competition between the two papers . . . ."

But other joint ventures and like forms of economic integration have often been found to be lawful. *See, e.g., United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 166 (S.D.N.Y. 1960) ("the parties entered into the arrangement for legitimate purposes without intent to fix prices") and the other cases cited at p. 28 of our main brief.

The point, as we noted in our main brief, is simply that the rule of reason, not *per se* rules, provides the standard for determining the lawfulness of the conduct challenged by CBS in this lawsuit.

And, as we have shown, under the rule of reason, ASCAP and its members may not be adjudged to be in violation of the antitrust laws. ASCAP's members, from the date the Society was formed in 1914, have entered into their arrangements for legitimate business purposes—to make available to users via the blanket license a bundle of rights not otherwise obtainable from individual writers

or publishers, which most users desire, need and, indeed, in some instances have demanded.

Clearly, today under the aegis of the Amended Final Judgment, ASCAP does not fix prices for the blanket license nor does it tamper with prices for direct licenses. It offers a blanket license at a fee which it deems reasonable; powerful television networks, or industry-wide committees representing local radio or television stations, make counter offers. The parties—in point of law, combinations of buying entities on one side of the table and of sellers on the other—negotiate. If they are unable to agree, a District Court judge is standing by to fix a reasonable fee.

The ASCAP offer of a fee is no more an act of price-fixing than any counter offer by the network or industry-wide committees on the other side of the table.*

There is, we submit, no antitrust significance in the fact that since 1950 the District Court has never been called on to determine a reasonable fee after a full hearing on the merits. What that fact demonstrates is that the present system operates as a reasonable mechanism for adjusting the economic interests of copyright proprietors and users.**

Negotiations between ASCAP and the various segments of the broadcasting industry have been hard-fought dealings between sophisticated, well-financed, and well-advised parties. ASCAP has never sought nor been in a position simply to place a proposed agreement before any of these users and command their signatures. Contrary to the im-

* It was in this context that ASCAP's former General Counsel, Herman Finkelstein, testified at trial in response to theoretical questions from CBS concerning the television networks' enormous bargaining power vis-a-vis individual copyright owners. (13A, pp. 3678-3686). Mr. Finkelstein did *not* testify at trial that ASCAP fulfills a "market-functioning necessity" as suggested by CBS in its brief at pp. 97-98.

** Congress adopted a similar procedure for determining reasonable fees to be paid by public broadcasters. It established a Copyright Royalty Tribunal, 17 U.S.C. §§ 118, 801(b) (1978).

pression CBS and the broadcaster *amici* try to create, the forms of ASCAP licenses to broadcasters are not dictated by ASCAP—they are carefully negotiated documents.

In these circumstances, the blanket license cannot be placed in that category of naked restraints so pernicious and lacking "redeeming virtue" that they are to be held *per se* illegal, *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958).

CBS argues that the right and willingness of ASCAP's members to deal directly is legally irrelevant because, in every price-fixing agreement, a party may withdraw and deal on an individual basis. It is true that price-fixers may welsh on their agreements, and it is true also that the agreement is the essence of the wrong. But there is, we submit, no similarity between (1) price-fixers who welsh on their agreements and (2) a group of copyright proprietors who when requested offer a useful and needed bundle of rights at a negotiated (or judicially determined) price, but who stand ready to deal individually with any customer who does not want to buy the bundle.

CBS complains of what it terms the "impact of an all-industry committee reference point price on competitive price equilibrium levels" (Brief for Respondent at 62). The CBS point seems to be that the blanket license should be outlawed because, in direct dealings with CBS, ASCAP's members would take into account the royalty distributions they have received under an ASCAP blanket license. CBS may be right—but if it is, we perceive no evil. After all, the payments that ASCAP receives from its licensees are based on arm's-length negotiations, and presumably that says something about the value of ASCAP licenses to the users. And the distributions that an ASCAP member receives from ASCAP are based principally on performances of his works—which says something about the value of his music to users. We see no reason why an ASCAP member might not appropriately take

these facts into account, with others, in determining what prices should be offered to a prospective licensee.

In any event, it is not productive for courts—and surely not for this Court—to hypothesize as to how prices might be set in a direct licensing market, once it has been established, *as the District Court found,* that there would be price competition in that market (Pet. App. 82a-93a, 115a, 119a-120a). And surely, such hypothesizing should not be the rationale for condemning the blanket license as price-fixing.

We need not dwell on CBS' legal authorities. The impact on price perceived by the courts in *Socony-Vacuum* and *Plymouth Dealers'* was clear, but these cases on their facts have no relevance here.

CBS ignores *Arizona* v. *Cook Paint & Varnish Co.,* 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on decision below,* 541 F.2d 226 (1976), *cert. denied,* 430 U.S. 915 (1977). That decision was (a) at odds with CBS' view of the proper scope of *Socony-Vacuum,* and (b) more consistent with this Court's view of the proper role of the *per se* doctrine than is CBS'. There, plaintiffs attempted to challenge under the antitrust laws defendants' cooperative advertising campaign. The advertising contained misrepresentations, said plaintiffs, and the necessary consequence of those falsehoods was to raise prices—which plaintiffs, relying on *Socony-Vacuum,* asked the trial court to hold illegal *per se.* The trial court (Renfrew, J.) refused, saying that price-fixing is only that conduct "whose actual purpose is to affect or regulate prices," 391 F. Supp. at 967. The Ninth Circuit affirmed on the opinion below.

The long-ago cases cited by CBS dealing specifically with ASCAP's activities, *e.g., Watson* v. *Buck,* 313 U.S. 387 (1941) and *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y. 1948), are of mere historical interest today. *Watson* held only that a Florida statute aimed at price-fixing *might* constitutionally be applied to ASCAP—

but two years later, in *Palm Tavern, Inc.* v. *ASCAP,* 15 So. 2d 191 (1943), the Supreme Court of Florida held that ASCAP did not violate the statute, saying at 194:

> "The price-fixing, if it be called such, as is reflected by the contract here under consideration, is not such as to be in restraint of trade, because there is no monopoly. It is specifically provided that the user of the material which is licensed by the Society may contract directly with the owner of the copyright or may otherwise acquire the right to use the material as such contracting party may see fit."

Alden-Rochelle involved ASCAP's relations with motion picture exhibitors over thirty years ago—prior to the 1950 Amended Final Judgment. As the Court of Appeals for the Second Circuit pointed out in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 331 F.2d 117, 121 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964):

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y. 1948) and *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn. 1948)."

In recognition of the changes thus wrought, the trial court vacated the injunctive order which it had entered in *Alden-Rochelle.*

III.

The CBS Per-Use License Is without "Redeeming Virtue"

CBS now concedes that the relief it seeks in this lawsuit, a per-use license, has all of the vices of *per se* illegality that CBS attributes to the blanket license (Brief for Respondent at 171). But, says CBS, the per-use license should be decreed as a form of relief because it is "less restrictive" than the blanket license and may be utilized as an interim step to a direct licensing market.

However, analysis of the manner in which CBS would have the per-use license operate reveals the ultimate appeal of that license to CBS—and its ultimate vice under the antitrust laws.

Thus, under a per-use license CBS would obtain the same blanket access to the ASCAP repertory it obtains under a blanket license, but it would pay only a specified price for the use of each composition, the price to be determined by ASCAP, by negotiation, or by the court. Armed with such a license, CBS says it would then approach copyright proprietors and directly license the compositions it desired to use.

It takes but a moment to realize that such direct licensing transactions would necessarily be at prices below the per-use rates set in the per-use license: CBS surely would not pay more for a composition in a direct licensing transaction than the price available under the ASCAP per-use license. Inevitably the per-use rate would be only a ceiling which CBS could use to drive down prices in direct dealing.

The per-use system which CBS envisages has still further attraction for CBS, since CBS contemplates that the ASCAP per-use rates would be adjusted periodically by the court to "reflect competitive market price equilibrium levels," (Brief for Respondent at 173)—*i.e.*, the

prices CBS had been able to extract in direct transactions below the previously-existing ASCAP per-use rates.

Thus CBS seeks an ASCAP per-use license which not only would establish ceiling prices, but would regularly be adjusted to lower the ceilings.

In short, the CBS per-use system is not a "less restrictive" form of price-fixing than the blanket license. Rather, it is a vehicle for price stabilization and reduction on the buyer's side of the market utterly without "redeeming virtue."

IV.

ASCAP Is Not Guilty of Tying; ASCAP Does Not Monopolize

Since it was the Second Circuit's judgment that ASCAP was not guilty of tying and that it was not an unlawful monopoly, and since CBS did not file a cross-petition for a writ of certiorari, it is not at all clear that CBS may now urge that those alleged violations require affirmance of the Second Circuit's judgment with regard to the offense of price-fixing.* In any event CBS' arguments are without merit.

A. *Tying.*

The Second Circuit held here (Pet. App. 11a):

> "[T]his finding of the District Court that there is indeed a viable alternative to the blanket license disposes of the charge that the blanket license involves an illegal tie-in or block-booking, *see, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159, 68 S. Ct. 915 92 L. Ed. 1260 (1948); 17 U. Chi. L. Rev. 183 (1949); Timberg, *supra* note 6 at 300 . . . ."

---

* *See* R. Stern & E. Gressman, *Supreme Court Practice* 477-87 (5th ed. 1978), and cases cited therein.

To the same effect: *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 6 n.4 (1958).

CBS now argues that this conclusion was erroneous because of the so-called "barriers" to direct licensing that CBS claims to exist.

But, as we have already shown, the findings of the Courts below preclude CBS from re-litigating in this Court any factual issue with regard to the existence of such "barriers."

B. *Monopolization*

The District Court found (Pet. App. 119a-120a):

> "[T]he relevant market includes *all* sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of 'direct' licenses.
>
> * * *
>
> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright proprietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place.
>
> * * *
>
> "Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent" (emphasis in original).

The Second Circuit held (Pet. App. 23a, n.29):

> "As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record."

The Courts below were right. Unlike unlawful monopolies, ASCAP has no power to, and does not, boycott or exclude either members or compositions. *Compare, e.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963); *Associated Press* v. *United States,* 326 U.S. 1 (1945). ASCAP has no power to control the supply of any product and thereby exact a price. *Compare, United States* v. *Aluminum Co. of America,* 148 F.2d 416, 426 (2d Cir. 1945). And ASCAP has no power to discriminate, either in price or in any other fashion, among users similarly situated. *Compare, e.g., United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 340-41 (D. Mass. 1953), *aff'd,* 347 U.S. 521 (1954).

No organization is a "monopolist" when it (a) permits everyone who so wishes to enter it; (b) permits everyone who so wishes to leave; (c) has no power to refuse to deal; (d) has no power to set a price; (e) has no power to discriminate among users or members; and (f) has no power to prevent its members from dealing with users directly.

CBS' response is (Brief for Respondent at 153):

> "the barriers to a bypass *both* place the blanket license in a separate market from individual performance rights *and* confer monopoly power on each common-sales agency that purveys a blanket license" (emphasis in original).

Again, CBS would re-litigate the District Court's undisturbed findings of fact.

CONCLUSION

The decision appealed from should be reversed and the order of the District Court dismissing the complaint should be reinstated.

Respectfully submitted,

JAY TOPKIS
BERNARD KORMAN
Attorneys for Petitioners
American Society of Composers,
Authors and Publishers, et al.

Of Counsel:

SIMON H. RIFKIND
HERMAN FINKELSTEIN
ALLAN BLUMSTEIN
MAX GITTER
RICHARD H. REIMER
FRED D. HEATHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

January 10, 1979

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

ROBERT H. BORK
127 Wall Street
New Haven, Connecticut 06520
(203) 436-0165

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

American Society of Composers, Authors and Publishers, *et al.*,

Petitioners,

v.

Columbia Broadcasting System, Inc., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

Aaron Copland, *et al.*, submit this brief as *amici curiae* in support of the petitioners, American Society of Composers, Authors and Publishers ("ASCAP"), *et al.*, seeking reversal of the judgment entered by the Court of Appeals for the Second Circuit on August 8, 1977. Eubie Blake, Sammy Cahn, Betty Comden, Hal David, Ira Gershwin, Adolph Green, Gian Carlo Menotti, Vincent Persichetti, Ned Rorem, William E. (Billy) Taylor, Virgil Thomson, and

the Estates of Bela Bartok, Edward Kennedy (Duke) Ellington and Igor Stravinsky join in this brief as *amici curiae*. Consent to submit this brief has been obtained from all parties and their letters have been lodged in the clerk's office of this Court.

INTEREST OF *AMICI CURIAE*

The *amici curiae*, Aaron Copland, *et al.*, are composers of music, authors of lyrics for music, and members of ASCAP. These *amici curiae* have interests in this litigation of several kinds.

The decision of the panel majority of the Court of Appeals for the Second Circuit to the effect that ASCAP's method of licensing performance rights for the *amici curiae's* copyrighted works constitutes price-fixing, which is illegal *per se* under Section 1 of the Sherman Act, may be read to mean that *amici* and other members of ASCAP were parties to an illegal combination. *Amici* may be exposed to treble damage liability and may have to incur literally ruinous legal expenses in defending themselves. *Amici* have, therefore, a great personal interest, quite apart from their interest in ASCAP's survival and effectiveness, in a reversal by this Court of the judgment of the Court of Appeals and invalidation of the novel *per se* rule upon which that judgment rests.

The *per se* rule created by the Court of Appeals majority, if it were applied according to its apparent rationale, would appear not only to outlaw blanket licensing but any form of licensing that an organization like ASCAP could

engage in. If that were to happen, and if ASCAP were effectively destroyed, these *amici* and other current members of ASCAP and BMI would be left without effective means of seeing that royalties were paid for the performance of their works by the tens of thousands of users of music in the United States. Composers, authors, and publishers would be thrown back to the unhappy condition in which they existed prior to the organization of ASCAP. The copyright laws of the United States gave such composers, authors, and publishers of music the legal right to receive royalties for the performance of their works but that legal right was largely worthless because of the utter impossibility of private individuals learning of all such performances and either negotiating satisfactory licenses or suing for infringement. Since the new law announced by the Court of Appeals would preclude the operation of any other organization serving the same functions as ASCAP, *amici* and others similarly situated would be legally and practically helpless to protect themselves and their means of livelihood.

If the new *per se* rule, and the accompanying decision that *amici's* copyrights have been misused are not overturned, *amici* will certainly suffer heavy losses of royalty income because of the expenses of litigation incurred by ASCAP in litigation with myriads of licensees all over the United States, possible treble damage awards against ASCAP and themselves, and the possibility that royalties may not be collectible, either by ASCAP or *amici* on copyrights held to have been misused.

QUESTIONS PRESENTED

1. Whether the diminution of price competition that necessarily occurs within any joint venture or any other economic integration, such as a partnership or corporation, is *per se* illegal under Section 1 of the Sherman Act.

2. Whether ASCAP can be held to have fixed prices for performance rights to musical works when every user has the option of having the license fee set by the District Court for the Southern District of New York.

3. Whether ASCAP can be held to have fixed prices for performance rights to musical works when every user has the option of ignoring ASCAP and negotiating directly for licenses with copyright owners.

STATEMENT OF THE CASE

Respondent Columbia Broadcasting System, Inc. (CBS), filed an antitrust action against petitioners ASCAP, Broadcast Music, Inc. (BMI), and certain individual members of each organization, alleging that the use of blanket licenses by ASCAP and BMI violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. A blanket license is one by which ASCAP for a stated term and royalty authorizes the licensee to perform any copyrighted work that ASCAP has the right to license. CBS alleged that price competition was eliminated between members of ASCAP, that licensing copyrights not used with those that were used constituted an illegal tie-in, that by dealing through ASCAP copyright owners were engaged in a concerted refusal to deal, and that ASCAP had attempted and achieved monopolization. CBS also charged that these activities constituted copy-

right misuse. CBS sought only injunctive and declaratory relief.

The District Court severed the issues of liability and relief and, after a nonjury trial of liability, held that the defendants had not violated the Sherman Act and had not misused their copyrights. It dismissed the complaint. The opinion of the district court is reported at 400 F. Supp. 737.

The Court of Appeals' opinion, reported at 562 F.2d 130, held that none of the District Court's extensive findings of fact were "clearly erroneous," and unanimously affirmed the holdings that the defendants had not engaged in any of the illegalities charged, with one exception. A majority of the three-judge panel held as a matter of law on the facts found by the District Court that the blanket license involves price-fixing and so is rendered illegal *per se* by Section 1 of the Sherman Act as interpreted by *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The copyrights were held to have been misused for the same reason. Price-fixing was held to exist because members licensing through ASCAP did not engage in price competition with one another but shared in the proceeds of the license. The majority held further that there is a defense to price-fixing that would otherwise be illegal where the price-fixing "is absolutely necessary for the market to function at all," 562 F.2d at 136. The defense was held unavailable here because CBS could obtain licenses directly from individual copyright owners, a right guaranteed by ASCAP's consent decree with the government.

The case was remanded for consideration of a remedy consisting of "some form of per use licensing," 562 F.2d at 140. A per use license involves a royalty payment for copyrighted works actually performed. The majority

stated, however, that the blanket license, which it had held illegal *per se*, need not be prohibited in all circumstances. "The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction," because some licensees might find it desirable, 562 F.2d at 140. The court also indicated that the "market necessity" defense might permit blanket licensing with respect to some classes of licensees, apparently without regard to their desires.

The concurring judge stated that he agreed that a remand for remedy proceedings was proper so that a practical method of adding per use licensing could be evolved, but added, "I do not agree that 'the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense,' " 562 F.2d at 141. This appears to be a statement that ASCAP has not violated the law but that relief should be granted to CBS.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no dispute over facts between petitioners and respondent that affects the legal issue presented here. That issue is whether the blanket license used by ASCAP, and approved by its consent decree with the United States, involves price-fixing made *per se* illegal by Section 1 of the Sherman Act. *Amici* submit that price-fixing is not involved in ASCAP's blanket license for each of three reasons.

First, the Court of Appeals majority ruled that price-fixing existed solely because composers, authors, and publishers, when they license through ASCAP, do not compete on royalty rates. But that fact does not constitute illegal price-fixing within any known or possible interpretation of

Section 1 of the Sherman Act. Every economic integration of persons, whatever its form—whether a partnership, corporation, or joint venture—has precisely the same effect. That degree of restraint, if such it be termed, which is inherent in the existence of ASCAP or any other licensing organization is also inherent in every economic unit involving more than a single person. The principle that would hold ASCAP's blanket licenses unlawful would necessarily condemn all such economic units. The invalidity of that principle is further shown by the fact that the Court of Appeals majority felt compelled to create a "market necessity" defense, despite the fact that *per se* rules allow of no defenses, and also to remand for a remedy involving the employment of per use licenses, which is at least equally vulnerable on the principle of illegality the court invented.

Second, as the Court of Appeals for the Ninth Circuit held in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), under ASCAP's consent decree with the United States, every licensee, including CBS, has the option of having the license fee set by the United States District Court for the Southern District of New York. This means that, at the licensee's sole option, ASCAP can be prevented from setting any fee.

Third, as *K-91* also held, and as the consent decree explicitly provides, any licensee is free to deal directly with any composer, author, or publisher and to bypass ASCAP altogether. This option, too, means that the licensee can prevent ASCAP from setting any fee by refusing to deal with ASCAP.

Each of these legal propositions independently requires that the judgment of the Court of Appeals be reversed and that judgment be entered for petitioner ASCAP.

ARGUMENT

I

ASCAP'S BLANKET LICENSE DOES NOT INVOLVE PRICE-FIXING CONDEMNED BY THE SHERMAN ACT BECAUSE THE EFFECT UPON RIVALRY BETWEEN MEMBERS IS ONLY THAT INHERENT IN AND INSEPARABLE FROM THE EXISTENCE OF ANY LICENSING ORGANIZATION OR OF ANY ECONOMIC UNIT CONSISTING OF MORE THAN A SINGLE PERSON

This point is the most crucial of the three we advance to the development of the antitrust laws generally. A decision against ASCAP would necessarily have devastating effects either upon the doctrinal coherence of the law or upon business and the economy. It is obvious that the economy will not be judicially destroyed, and, therefore, it is the coherence of the law that will suffer. ASCAP ought not to be held liable under a rule that will not be applied to all.

A. ASCAP's Blanket License Does Not Involve Price-Fixing.

The panel majority's opinion shows on its face that it thought price-fixing was involved not merely in ASCAP's blanket license but in almost any conceivable activity of

ASCAP as an agent for composers, authors, and publishers. (The concurring judge took the curious position that ASCAP had not violated the law but that relief should be entered against it.) The majority stated:

> The charge that there is a restraint of trade by price fixing is founded upon the conception that when any group of sellers or licensors continue to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.

562 F.2d at 137-38 (emphasis in the original).

The majority concluded that there existed, therefore, a combination which tampers with price structures and thus engages in unlawful activity within the meaning of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). It continued:

> There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition . . . .

562 F.2d at 136.

It is to be noted that the Court of Appeals' "price-fixing" rationale has nothing to do with the form of licensing

used by ASCAP; it is an objection to ASCAP determining the compensation of its members, and that objection would apply unless members bid competitively through ASCAP to get their works performed.

Though it is not the case that ASCAP pays compensation to those whose "wares" or copyrights are not used (most members never receive an ASCAP check), the clear legal error of this reasoning lies in applying to an economic integration, or joint venture, the rule of *per se* illegality appropriate to cases like *Socony-Vacuum* involving a naked restraint, where the suppression of competition is the sole object of the combination. ASCAP, on the contrary, performs a vital and legitimate economic function that cannot be performed at all if no diminution of competition within the organization is permitted by law. In this, it resembles such familiar examples of economic integration as law firms, corporations, and league sports. It makes no more antitrust sense to say that the Sherman Act forbids the existence of ASCAP than it would to say the law equally prohibits law firms, corporations, or sports leagues.

ASCAP was created because individual composers, authors, and publishers were helpless to police the performance of their copyrighted works and thus did not realize the royalty income to which the law entitled them. ASCAP, therefore, took over the functions of licensing and policing that were utterly beyond the capabilities of individuals or smaller associations. Without ASCAP and BMI these functions would not be done. A law journal comment shows why:

> Without ASCAP, licenses for individual performances would have to be negotiated, and all performances

> would have to be policed by all composers. The costs would be enormous. A single radio station, for example, may broadcast as many as 60,000 performances of recorded musical compositions each year, involving as many as 6,000 separate compositions. As of 1975 there were 7,158 radio stations in the United States, as well as some 714 television stations and thousands of restaurants, bars, hotels, theaters, and other businesses that use ASCAP music. It has been estimated that there are now over one billion licensed performances of ASCAP music annually.*

That is why ASCAP, which is a clearinghouse for performing rights to copyrights held by 16,000 composers and authors and 6,000 music publishers, must exist. Moreover, there is within ASCAP all the competition between copyright owners that is possible. Each copyright owner is compensated through a complex formula that reflects the popularity of, and demand for, his product. If the owner's work is not performed, he is paid nothing. This highlights the essential dissimilarity between ASCAP and a cartel in which the inefficient producer is guaranteed a share of the market and a profit in order to dissuade him from competing.

No more competition is possible within a joint venture in licensing and policing, which ASCAP is. The decree under which ASCAP operates provides that its members may deal individually with licensees. But it is both physically and commercially impossible for ASCAP itself to become a market resembling a stock exchange by keeping in continual communication with all of its members, advising them of every potential licensee's interests and asking

* Comment, "CBS v. ASCAP: *Performing Rights Societies and the Per Se Rule*," 87 Yale L.J. 783, 786 (1978) (footnotes omitted).

for bids, advising again of competitive offers, and continuing the process until all bids were in and the licensee able to pick among them. Since there are over one billion licensed performances of ASCAP music annually, there would obviously be many more billions of bids and offers. Not only would the process be enormously expensive, if it were technologically achievable, but every successful composer, author and publisher would have to spend all or a substantial part of his day at a computer terminal receiving information about what every other member was asking and continually adjusting his own royalty demands. Though that is obviously impossible, it would be the only process that could avoid the Court of Appeals' ruling that there must be a competitive market inside a joint venture.

CBS has claimed that ASCAP, with modern computer technology, could run an internal market for CBS. ASCAP has denied that. But if we assume, solely for the argument here, that CBS is correct, it would make no difference under the law. On such an assumption, ASCAP might be able to run a computerized internal market for any one licensee of any type, but what has been said shows the impossibility of bringing copyright owners together in a bidding situation as to all licensees, or, indeed, for any large number of the tens of thousands of licensees. There is no Sherman Act principle that CBS or any other licensee has a right to an internal bidding system that might, arguendo, be created for one but not for all. Every licensee would have an equally good claim and the law does not require that CBS be preferred.

In this inability to function and simultaneously provide a fully competitive market internally, ASCAP precisely

resembles a major law firm. When clients come to a law firm with complex pieces of work, the firm assembles the talents of the lawyers at its call and determines the rewards of each. The panel majority's rationale would call that a combination that tampers with price structures and illegal *per se* under *Socony-Vacuum*. Presumably, in order to comply with the Sherman Act, the individual lawyers in the firm must bid against one another to work on every client's case.

The law has condemned naked restraints, it has had difficulty with ancillary restraints, but it has never, until now, made the mistake of condemning that diminution of competition which, of necessity, occurs within an economic venture such as a partnership or ASCAP. As Judge Taft put it at the outset of antitrust policy: "when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Taft was talking not about ancillary restraints, which he discussed next, but about the inherent restraint that occurs whenever men cooperate in a useful economic function.

The rationale advanced by the two judges in the Court of Appeals, contrary to this ancient and sound learning, if applied consistently, would make any economic integration unlawful—not merely ASCAP and law partnerships but corporations, sports leagues, joint ventures, and family farms—because each is a combination of persons who could

operate individually, yet, within the unit, are rewarded not by open market competition with one another but according to a determination made by the economic unit of how much each should receive.* Any principle making that illegal is inconsistent not merely with antitrust but with even the most primitive economy. It is precisely what Justice Holmes warned against: "an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 411 (1904) (dissenting opinion).

The Court of Appeals majority struck down blanket licensing to CBS on a rationale that is irrelevant to blanket licensing but which would outlaw the existence of ASCAP and all other economic integrations.

B. The Court of Appeals' Need to Invent a "Market Necessity" Defense Shows the Fallacy of the "*per se* Rule" It Also Invented.

The Court of Appeals majority itself apparently realized that it had fashioned a *per se* rule of impossible overbreadth and severity, for it attempted to compensate by inventing a so-called "market necessity" exception. There never before has been an exception to a *per se* rule; indeed the concept of a defense to a *per se* rule is a contradiction in terms. The meaning of this new antitrust notion is

* The function of determining payments to the owners of economic inputs which the Court of Appeals describes as *per se* illegal is, in fact, the distinctive function, and the reason for the existence of, firms. *See* A. Alchian & H. Demsetz, "Production, Information Costs, and Economic Organization," 62 *Am. Economic Rev.* 777 (1972). That is why the Court of Appeals majority's legal rationale demands what is flatly impossible.

unclear since the Court of Appeals said only: "In short this concept holds that price-fixing is *per se* illegal except where it is absolutely necessary for the market to function at all," 562 F.2d at 136. The court majority did say that it would have reached the same result as the Ninth Circuit in *K-91* because a blanket license to a single radio station would be "entirely justifiable as an example of market necessity." 562 F.2d at 140 n.26. "Indeed," the court majority continued, "CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations." *Id.*

CBS may concede that, but there is no reason to suppose that the great number and variety of licensees in this country will accept CBS' concession on their behalf and the prospect is for almost endless litigation between ASCAP and its members, on the one hand, and, on the other, all types of licensees, each of them contending that market necessity does not obtain as to it. Many other types of organizations which necessarily reduce internal competition among their members may expect similar litigation.

The only apparent meaning of the market necessity defense is that price-fixing is allowable where costs of doing business (transaction costs) would otherwise be prohibitively, or perhaps unreasonably, high. Entertaining such a defense would place an antitrust court in the position very much like that of an agency regulating prices. The court would receive evidence of the costs of doing business through a joint venture or partnership and then take and compare evidence of the costs of doing business if each of the members of the joint venture or partnership were required to operate singly. The judgment to be made would then be one of degree. Since "necessity" is the test,

the presence of merely substantial additional costs would presumably not establish the defense, but at some point the costs of separate operation would become so impressive that economic integration would be allowed. That would be an impossible test to administer, it certainly contemplates a function ill-suited to courts, and it is no different in its basic rationale than the reasonable-price defense to price-fixing that the Sherman Act long ago, and quite properly, rejected. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

The problems created by the need for a "market necessity" defense in an overbroad rule of illegality are greater even than this, however. The defense manages to be at once too broad and too narrow. It is too broad because any defendant can raise it in any price-fixing case—contending, for example, that price competition would increase uncertainties, unnecessary duplication of efforts, and so on, thus increasing costs to the point where the market would not function without the agreement. The defense might almost invariably fail, but its availability would complicate and lengthen trials and destroy the efficacy of the *per se* rules. Indeed, if the defense is accepted as legitimate in price-fixing cases, it would be equally applicable to cases involving other *per se* rules—those, for example, against naked horizontal market divisions and concerted refusals to deal.

The concept of market necessity is also too narrow because it does not, so far as one can tell, permit economic

integrations which greatly improve the efficiency of economic activity but which are not "absolutely essential" to the existence of some market for that activity. When lawyers form a partnership they necessarily limit the economic rivalry that would otherwise exist between them, but clients find that the firm gives more effective service than they could obtain by dealing with the same number of lawyers individually. For many kinds of work, the partnership is a more efficient economic unit than the sole practitioner. But can it be said that the partnership is "absolutely essential" for the market for legal services to function at all? It would seem not. Nor could it be said that leagues, with their inevitable lessening of economic rivalry between the members, are utterly indispensable to the existence of professional sports, nor that grocery retailing could not exist without stores manned by more than one person. Thus, the Court of Appeals majority's bizarre version of the *per se* rule, which prohibits the inherent and unavoidable diminution in price competition between persons within an economic unit, would attack the most usual and useful forms of economic integration, and the "market necessity" defense would save only those few where the costs of doing business individually, without help, were prohibitive beyond question.

C. The Fallacy of the "*per se* Rule" Invented by the Court of Appeals Is Also Shown by the Fact That the Court Proposes a Remedy, Per Use Licensing, Which Would Be at Least Equally Invalid Under the New Rule.

That the Court of Appeals' rationale is incapable of consistent application is further shown by the fact that the court remanded the case for the fashioning of a remedy

involving per use licensing although that form of licensing is at least equally objectionable under the theory by which blanket licensing was held unlawful. We have shown that the objection is really to the existence of a performing rights society and, for that reason, no shift in license practices will eliminate the feature the majority below erroneously saw as price-fixing. Thus, the per use license, which will require ASCAP to determine royalties, will necessarily involve that "threshold elimination of price competition" that the Court of Appeals held to be the vice of the blanket license.

The function of an antitrust remedy is to replace an illegal situation with a legal one, not to give the plaintiff his choice of distribution practices without regard to their respective legal statuses.

It is obvious that the majority of the Court of Appeals outlawed blanket licensing by ASCAP on a legal theory that is not merely incorrect but impossible. It is also apparent, we submit, that blanket licensing cannot be held unlawful under the Sherman Act without adopting a theory that would make the very existence of a licensing and policing organization illegal. This is the primary reason the judgment of the Court of Appeals should be reversed. There are others.

II

ASCAP CANNOT FIX THE LICENSE FEE CHARGED ANY LICENSEE IF THE LICENSEE EXERCISES ITS RIGHT UNDER THE CONSENT DECREE TO HAVE THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK SET THE FEE

The Court of Appeals for the Ninth Circuit rejected a similar challenge to ASCAP's blanket license in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968). *K-91* arose when several copyright owners sued a radio station operator for copyright infringement because the operator of K-19 had played their musical compositions on the air without the owners' permission or consent. K-91 raised antitrust charges, including an allegation that ASCAP and the copyright owners, who were ASCAP members, had conspired to fix prices in violation of Section 1 of the Sherman Act. The antitrust charges were raised both as a defense of misuse and as a basis for a counterclaim seeking triple damages. The district court ruled in favor of the copyright owners.

The Court of Appeals affirmed:

> ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the con-

> sent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, *so long as ASCAP complies with the decree, it is not the price fixing authority.*

372 F.2d at 4 (emphasis added).

In the present case, the majority of the Court of Appeals for the Second Circuit held that the decree was of no assistance to ASCAP because ASCAP fixed the licensee fee and reasonableness is no defense to price fixing. That reasonableness is no defense is true but irrelevant. The Ninth Circuit's point, which is clearly correct, is that when the district court sets the royalty, ASCAP does not set any price whatever, and that all licensees or prospective licensees have the option of getting the royalty set by the district court in every instance. Thus, if ASCAP's licenses did constitute price fixing, and we have shown that they do not, it would be price fixing that every licensee could easily avoid.

III

ASCAP CANNOT FIX THE LICENSE FEE CHARGED ANY LICENSEE IF THE LICENSEE EXERCISES ITS RIGHT UNDER THE CONSENT DECREE TO BYPASS ASCAP COMPLETELY AND DEAL DIRECTLY WITH ANY COMPOSERS, AUTHORS, AND PUBLISHERS IT WISHES

The Ninth Circuit, in *K-91,* found another feature of the consent decree that exonerated ASCAP:

> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved.

372 F.2d at 4.

There seems no escape from this reasoning. Most users find it preferable in terms of cost and effort to license from ASCAP. That is, as we have shown, a major reason for ASCAP's existence. Any user that believes its cost would be lowered by dealing with composers, authors, and publishers directly, is entirely free to do so. This fact also demonstrates that ASCAP is not a cartel but a clearinghouse and that, unlike any price-fixing arrangement known to the

antitrust laws, makes no effort whatever to dissuade its members from dealing with anyone at any price they choose.

The truth is that CBS has not the remotest interest in what it calls "competition"—the opportunity to negotiate prices directly with individual composers, authors, and publishers. It already has that opportunity. It demands instead a form of license condemned by its own legal theory. The per use license, which CBS seeks and which the Court of Appeals said it was entitled to, also requires ASCAP to determine the royalties paid its members and thus necessarily involves the same "threshold elimination of price competition" the Court of Appeals held to be the vice of blanket licensing.

CBS has no right to demand, and the court no power to order, the adoption of a form of licensing that, on the rationale of the decision, is legally indistinguishable from the form of licensing held illegal. Since blanket and per use licenses have the same characteristics with respect to ASCAP's determination of royalty payments to copyright owners, they are either both lawful or both unlawful. If the blanket license is lawful, as we think it plainly is, no court has the authority to order the per use license substituted for it. If both licenses are unlawful, no court can permit either to be used.

If the novel legal theory invented by the Court of Appeals were correct, the only appropriate remedy would be the prohibition of *any* licensing by ASCAP to *any* licensee and a requirement that every licensee negotiate directly with individual copyright holders. But that is precisely the remedy CBS does not seek, and it is the choice now completely available to it under ASCAP's consent decree.

CONCLUSION

For the reasons stated, the Court of Appeals decision should be reversed.

Respectfully submitted,

Robert H. Bork
127 Wall Street
New Haven, Connecticut 06520
(203) 436-0165

November 16, 1978

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae
234 W. 44th Street
New York, N.Y. 10036
(212) 391-9198

TABLE OF CONTENTS

Table of Authorities

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae*. The Authors League is the national society of professional authors and dramatists. Many of its members compose musical works, nondramatic performances of which are licensed by ASCAP and BMI. The Court of Appeals

decision would destroy the effectiveness of the licensing organizations and deprive these composers of the opportunity to collect compensation for performances of their work. Consequently, The Authors League requests permission to file its brief *amicus curiae*. The attorneys for ASCAP and Columbia Broadcasting System have consented to the filing of the brief.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc. as *amicus curiae*

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.

Interest of The Authors League

The Authors League is the national society of professional authors and dramatists. Its 7,500 members write books, plays and other literary and dramatic works. Many of them compose musical works for the stage, and non-

dramatic performances of these works are licensed by ASCAP (American Society of Composers, Authors and Publishers) or BMI (Broadcast Music, Inc.). The Court of Appeals' decision would destroy ASCAP's and BMI's effectiveness as licensing organizations and, given the realities of the marketplace for music, thus deprive these composers of the practical means—in many marketplaces—of collecting compensation for public performances of their works and of enforcing the most valuable right granted to them by the United States Copyright Act.

Summary of Argument

I. The Court of Appeals erroneously ruled that blanket licenses for public performances of musical compositions are illegal *per se* under the Sherman Act. Blanket licensing is not a price-fixing device that is prohibited, *per se,* by the Sherman Act. ASCAP's blanket licenses serve legitimate needs of both users and composers of music, unrelated to any price-fixing scheme; and do not restrain competition between composers (or publishers).

II. The Court of Appeals decision that ASCAP should provide a per-use standard license rebuts its conclusion that ASCAP's blanket licenses are illegal *per se.* There is no difference, in an antitrust sense, between these two forms of standard licenses.

III. CBS was not entitled to a judgment declaring that blanket licensing was illegal *per se.* It was not obliged to accept a blanket license and, as the District Court found from the evidence, it is able to obtain licenses in direct negotiation with copyright owners.

IV. The Court of Appeals' decision ignores the antitrust realities of the marketplace for music.

ARGUMENT

I. Blanket Licensing Does Not Violate The Sherman Act.

A. The Function and Necessity of Blanket Licensing.

Decades of experience in the United States and many other countries demonstrates that blanket licensing is, for both users and copyright owners, the practical method of licensing public performances of music by broadcasters, restaurants, nightclubs and other users. (We are referring to "small" performance right licenses. "Grand" performance rights, e.g. to make dramatic uses of musical works in stage productions, are licensed individually and not by ASCAP.)

A given user may present or disseminate hundreds or thousands of performances in a year, using the works of countless composers. The costs of negotiating and administering a separate license for each performance of a particular composition often would be enormous in proportion to the royalty involved. Blanket licensing provides an essential cost and administrative saving for both copyright owners and users.

Blanket licensing also permits copyright owners to protect themselves against infringement and noncompliance with licenses. No composer or publisher could afford to monitor the hundreds of millions of performances throughout the United States each year to detect infringements of his or her compositions, or nonpayment of royalties for authorized performances.

Moreover, individual licenses cannot give users assured access and automatic clearance with respect to a vast collection of copyrighted musical works. Both conditions are essential to most users; blanket licensing provides them.

B. An ASCAP Blanket License is Not a *Per Se* Price-fixing Device That Violates Section 1 of the Sherman Act.

The Court of Appeals agreed with the District Court that an ASCAP blanket license is not an illegal tie-in or block booking mechanism because CBS (or any other user) could have acquired performance rights from individual copyright owners in a "direct negotiation market without having to take a blanket license from ASCAP." 562 F.2d 134.

The Court of Appeals, however, ruled that a blanket license was, *per se,* illegal as a price-fixing device; and could not be saved (vis-a-vis the three networks) under a "market necessity" exception, because a "direct negotiating market" was available—neatly snaring ASCAP in a classic CATCH 22. 562 F.2d 138.

The Court of Appeals' opinion thus brands all ASCAP blanket licenses* with all users as *per se* violations of the antitrust laws leaving ASCAP only the possibility of salvaging some licenses—at huge legal expense—under a "market necessity" exception. Unless the decision is reversed, ASCAP's blanket television network licenses will be declared *per se* invalid, and other blanket licenses will no doubt be attacked as price-fixing agreements.

The Authors League believes that the Court of Appeals erred. The blanket license is not, for the reasons discussed below, a *per se* violation of the Sherman Act. Indeed, the relief prescribed by the Court of Appeals totally rebuts its conclusion of *per se* invalidity and its reasons for reaching that conclusion. We respectfully submit that a blanket license is not a price-fixing device which is prohibited, *per se,* by Section 1 of the Sherman Act; and that the record

* Our arguments apply equally to the judgment against BMI which also should be reversed.

makes clear that the blanket license has not been employed by ASCAP in a manner which violates the Sherman Act.

As the Solicitor General noted in his *K-91* brief*

> "There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. (case cited)" (Quoted at 562 F.2d 137)

The Court of Appeals in *K-91,* and the Solicitor General, concluded that ASCAP's blanket licensing did not violate the Sherman Act.

ASCAP's blanket licensing is, of course, "subject to strict limitations." ASCAP must grant a license to every user who requests it. If the user and ASCAP cannot agree on a fee, the user can request the District Court to set one. ASCAP cannot prevent its members from granting individual licenses in their compositions and ASCAP may not grant licenses to perform specific compositions.

Beyond that, however, an ASCAP blanket license does not fall within the price-fixing prohibitions of the Sherman Act for the following reasons.

C. ASCAP's Blanket License Serves Legitimate Needs of Users Totally Unrelated to Any Price-fixing Scheme.

(i) The blanket license is not a device by which a group of competitors arranges to sell their respective products to users at the same price. ASCAP does not separately license the compositions of each "competitor" (writer and publisher) at the same fixed price and remit that amount to the copyright owner.

* *K-91, Inc.* v. *The Gershwin Publishing Corp.,* 372 F.2d 1 (9th Circuit, 1967), cert. denied 389 U.S. 1045 (1968).

(ii) What ASCAP does license is a vast collection of musical works. The fee paid by a user is compensation for the right to use that *collection* during the licensed term. In effect, ASCAP offers a gigantic anthology of music to those who wish to perform various of its contents during the licensed period. The price of the "anthology" is not the sum of the fees a buyer would pay if it licensed separately the many compositions it wished to use. As with a literary anthology, the price of ASCAP's "anthology" is cheaper for bulk users than the costs of those contributions licensed separately.* Moreover, the price paid for ASCAP's anthology provides other benefits.

(iii) Each broadcaster or other user that chooses to "purchase" (i.e., blanket-license) ASCAP's anthology acquires the benefits of immediate access and automatic clearance—benefits it could not obtain (or could only obtain at enormously greater administrative cost and burden) by separate licensing of each composition through direct negotiation.

(iv) Those who obtain blanket licenses from ASCAP do so because they need immediate access and automatic clearance with respect to a vast collection of copyrighted musical works. With a blanket license, a user need not take time to seek out, then negotiate with, the copyright owner of each composition. There are no doubts as to whether the owner of a composition in ASCAP's anthology will agree to license the performance. The user obtains the guaranteed right, during the license period, to select and

* One difference between a literary anthology and ASCAP's anthology is of particular significance here. Usually, every author whose poem or article is published in a literary anthology is paid a fee and/or percentage of the total royalty on the book—whether or not those who buy the anthology have any interest in or "use" (read) his work. On the other hand, the composers whose works are included in ASCAP's anthology are only paid if their works are actually used, and only for those uses.

perform any compositions in the vast repertoire—including works that may just have been published.

(v) The blanket license thus is a separate product with distinct and practical benefits to users who acquire it. It is offered, and acquired, because of the inherent benefits it provides—and not as a subterfuge to obtain for all competing members the same price for the use of their works.

D. A Blanket License Does Not Restrain Competition Between Composers (or Publishers).

(i) A blanket license does not, as the Court of Appeals suggested, compensate composers whose "wares" are not used. The blanket license fees collected by ASCAP from networks and other users are distributed to members under a formula keyed to the type and number of performances of their works. The more performances a member has, the greater the amount of income distributed to him/her by ASCAP. The fewer the performances, the lower the amount a member receives. If there are no performances, the member receives nothing.

(ii) Under blanket licensing there is vigorous competition among the members of ASCAP: the most significant and socially valuable form of competition in the musical, literary and dramatic marketplaces—competition based on the merits of the works vigorously contending with each other for public acceptance. Too, distribution based on performance also stimulates vigorous competition between copyright owners in the promotion of their works in the broadcast, recording and other media.

(iii) The Court of Appeals speculated that a given member's income from ASCAP might be larger than the royalties he would have received in a free market through direct negotiation. We respectfully disagree. Since each member's ASCAP income is determined by the number of

performances, the value of his or her works are measured by the marketplace. Composers whose works are more highly valued by the market test of performance would receive greater royalties under individually negotiated licenses than composers whose works are valued lower.

We should also note that the *net income* received by some composers through ASCAP is probably more than the net income they would receive under individual licenses for two reasons. First, because the administrative costs and burden of negotiating individual licenses constitute a far greater drain on the gross royalties received. Second, because the wider availability of their compositions under a blanket license increases the possibility that these will be performed. Under individual, directly negotiated licenses, it is likely that works of merit by less prestigious authors or less affluent publishers would not be employed as frequently by users, who would concentrate on the larger catalogs of a few major publishers to minimize the administrative costs of direct licensing. Blanket licensing does not give these composers and publishers a "free ride" since payment is based on the marketplace's evaluation of merit—performances. But blanket licensing does give all bulk users the opportunity to perform the compositions they think best suited for their purposes.

(iv) An ASCAP blanket license is not, therefore, a subterfuge by which individual composers agree not to "compete" with each other in the licensing of their compositions to broadcasters, restaurants, nightclubs, and thousands of other users. Blanket licensing serves the legitimate and lawful needs of individual composers, seeking to exploit the performance right granted to each of them by the United States Copyright Act. It provides for them the opportunity to make their works available to a large number of potential performing entities. It eliminates the greater administrative costs and burdens of individual licensing. It provides the only effective means for detecting and preventing infringing performances in thousands of outlets throughout the United States. It also avoids the costs of separately verifying compliance with individual licenses.

Moreover, blanket licensing permits each member of ASCAP to make his works available in a form which serves the needs of prospective music users, many of which would not perform his/her works if they were offered only under individual licenses, directly negotiated.

II. The Remedy Prescribed by the Court of Appeals Rebuts Its Conclusion of *Per Se* Illegality.

The Court of Appeals concluded that ASCAP's blanket licensing was illegal *per se* because "it reduces price competition among members and provides a disinclination to compete." 526 F.2d 140. Yet the validity of that conclusion is rebutted by the very remedy the Court of Appeals prescribes.

The Court said its objection to the blanket license would be removed "if *ASCAP itself* is required to provide some form of per use licensing which will insure competition among the individual members with respect to those networks which wish to engage in per use licensing." 562 F.2d 140 (emphasis supplied)

But a per use license provided by "ASCAP itself" would not differ in any antitrust sense from the present blanket license. An ASCAP per use license would grant to users (as does the blanket license) automatic clearance for performances of any or all compositions in its repertoire. An ASCAP per use license (as does the blanket license) would set a standard license fee, negotiated by

ASCAP and the user (or a schedule of standard fees for various categories of performances); the fee for the use of a composition still would not be negotiated directly by the individual composer or publisher and the user.

The only change from the current blanket license would be that the standard fee would be set on a per use basis rather than, as now, on the aggregate value to the user of performance rights in the repertoire during the period of the license. Finally, under an ASCAP per use license (as under the present blanket and per-program licenses) all ASCAP members would receive the same compensation for a use of their work. Plainly, an ASCAP per use license would not create greater price competition among its members than do the current blanket or per-program licenses.

We respectfully submit that the reasonable and equitable alternative to the blanket license is the one that has been available for almost 30 years—i.e., for CBS or the companies that produce its programs to engage in direct negotiations for individual licenses with those copyright owners whose works CBS wishes to have performed on the stations of its network.

III. CBS Is Not Entitled to a Judgment Declaring Blanket Licensing Illegal *Per Se.*

For the reasons stated above, we believe blanket licensing is not illegal *per se*. On this record, we submit that CBS is not entitled to a judgment that blanket licensing is unlawful. CBS has chosen not to execute a blanket license and, the record establishes, the license cannot be forced upon it. (Nor has ASCAP sought to coerce users to accept a blanket license.)

Moreover, the existence of blanket licensing with other users does not compel CBS to use it. CBS and the producers are free to directly negotiate licenses with individual copyright owners. Judge Lasker's thorough analysis, accepted by the Court of Appeals, establishes that such direct negotiation of licenses is feasible through existing mechanisms in the marketplace of music. (400 F. Supp. pp. 755 to 768).

There is no proof that individual ASCAP members would refuse to grant licenses to CBS if it requested them. On the contrary, it is obvious that individual members of ASCAP readily would grant direct licenses for the use of compositions if CBS or the producers requested such licenses. (400 F. Supp. pp. 755 to 771). It required no parade of evidence—although a parade was held—to establish that composers and publishers simply could not afford to refuse licenses to CBS, should the network eschew the blanket license. Through its oligopolistic power in the television marketplace, CBS is an indispensable customer for their music. They would have no choice but to grant licenses through individual negotiation—faced with what the Court of Appeals termed ". . . the counterforce of the strong bargaining position of CBS." (562 F.2d 140, n. 7)

IV. The Court of Appeals Decision Ignores the Antitrust Realities of the Marketplace for Music.

Meaningful competition in a given marketplace requires competing buyers as well as competing sellers, and some semblance of equal bargaining power between buyer and seller communities. These conditions do not exist in the television marketplace. Three oligopolies control the lion's share of the television marketplace in this country: CBS, ABC and NBC. Each network owns five television stations in major markets; five enormous monopolies granted to it by the Federal Communications Commission. (cf. *Red Lion Broadcasting Co., Inc. et al.* v. *F.C.C.;* 395 U.S. 367, 388-9

(1969)). These monopolies allow CBS to determine what music (and other material) will be broadcast over these publicly-owned channels of communication it thus controls. In addition, CBS has combined and acts in concert with 200 other monopolists—the 200 affiliated stations of the network which control television channels in other market areas. Consequently, CBS exercises absolute power to determine what music shall be performed in network programs on the more than 200 television stations in the United States; CBS unquestionably exercises enormous oligopolistic power in the television marketplace.

While extolling the virtues of "price competition" between individual composers, the Court of Appeals ignores the realities of the marketplace in which it expects these economic Lilliputians to compete with each other. It is unrealistic to assume that an individual composer possesses bargaining power sufficient to match "the strong counterforce of the bargaining position of CBS." If the composer does not negotiate to CBS's satisfaction, he faces the strong possibility that his composition will not be performed in that huge segment of the television marketplace CBS controls.

In the real marketplace of television, moreover, there will be far less price competition between individual composers dealing with CBS than the Court of Appeals seems to assume. To a large extent, the price will be determined by what CBS chooses to pay, rather than the fact that composer A offers a cheaper license than composer B. Nor will CBS reject the highly popular composition it needs because it can license a less successful work at a lower price. Moreover, a primary effect of an ASCAP per use license, mandated by the Court of Appeals, would be to impose a *de facto* ceiling on the price that an individual composer or publisher could obtain from CBS. The history of nego-

tiations by composers and publishers with record companies under the ceiling imposed by the Copyright Act on royalties for recordings of music (17 U.S.C. Sec. 115; and Sec. 1(e) of the 1909 Act), is persuasive evidence that this result will occur.

CONCLUSION

It is respectfully submitted that the decision appealed from be reversed, and the order of the District Court dismissing the complaint be affirmed.

Respectfully submitted,

Irwin Karp
Attorney for The Authors League of America, Inc.
234 W. 44th Street
New York, N.Y. 10036
(212) 391-9198

see

77

1578